

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2242

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

NORMAN RICH, SHELDON SCHIFF and HOWARD SCHIFF, as trustees of the West Side Corp. Profit Sharing Plan, SIMON MARGULIES, LOUIS MARGULIES, MARILYN MARGULIES, CHARLES SHURPIN, and LILLIAN SHURPIN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

vs.

NEW YORK STOCK EXCHANGE, LADENBURG THALMANN & CO., ARTHUR LEVINE, SOL LEIT, ALLEN SOLOMON and JOEL KUBIE,

Defendants-Appellees.



JOINT APPENDIX

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(Continued on Next Page)

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TABLE OF CONTENTS

Appendix

| | Page |
|--|------|
| Docket Entries | 1a |
| Second Amended Complaint (Filed December 13, 1973) | 6a |
| Answer and Cross-Claims of New York Stock Exchange, Inc. (Filed December 26, 1973) | 16a |
| Defendant Ladenburg's Amended Answer and Cross-Claims (Filed January 25, 1974) | 21a |
| Defendant Exchange's Notice of Motion for Summary Judgment (Filed April 26, 1974) | 28a |
| Affidavit of Russell E. Brooks in Support of Motion | 30a |
| Exhibits Annexed to Foregoing Affidavit: | |
| A - Second Amended Complaint (Printed herein at page 6a) | 34a |
| B - Letter Dated December 19, 1973 From William R. Shields to Robert Millstone | 35a |
| B - Article From The New York Times Dated November 1, 1973 | 37a |

Contents

| | Page |
|---|------|
| Affidavit of James W. Giddens In Support of Motion | 38a |
| Reply Memorandum In Support of Motion For Summary Judgment (Filed April 21, 1974) | 42a |
| Affidavit of Marvin G. Pickholz | 53a |
| Exhibit A - Letter Dated January 25, 1974 From Lee A. Pickard to John W. Wydler Annexed to Foregoing Affidavit | 60a |
| Exhibit B - Decision Dated March 26, 1974 | 63a |
| Memorandum of Defendant Ladenburg, Thalmann & Co., Inc. (Filed May 8, 1974) . | 70a |
| Letter Dated May 21, 1974 From Russell E. Brooks to Charles L. Brieant | 77a |
| Affirmation of Alfred S. Julien | 79a |
| Memo Dated June 1, 1973 From James J. Needham to Members and Allied Members | 87a |
| Affidavit of Charles Shurpin in Opposition . . | 89a |

Contents

| | Page |
|--|------|
| Exhibit A - Income Tax for Year 1973 Annexed to Foregoing Affidavit | 96a |
| Affidavit of Sheldon Schiff in Opposition . . | 97a |
| Exhibit A - Profit Sharing Plan Annexed to Foregoing Affidavit | 101a |
| Plaintiffs' Memorandum of Law in Opposi- tion to the Defendant's Motion for Sum- mary Judgment | 102a |
| Plaintiffs' Supplemental Memorandum of Law (Dated May 30, 1974) | 109a |
| Letter Dated May 22, 1974 From Marvin G. Pickholz to Charles L. Brieant | 122a |
| Letter by Richard C. Tufaro to the Hon. Charles J. Brieant Dated April 24, 1974 . . | 124a |
| Memorandum Decision (Filed July 23, 1974) . | 125a |
| Final Judgment (Filed August 7, 1974) . . . | 144a |

UNITED STATES DISTRICT COURT DOCKET ENTRIES

Jury demand date

73 CIV. 464 ^{1a}

D. C. Form No. 106 Rev

10-31-73 by pltrf

TITLE OF CASE

AFFIDAVITS

NORMAN RICH, SHELDON SCHIFF &
HOWARD SCHIFF, as trustees of
the West Side Corp. Profit Sharing
Plan, on behalf of themselves &
all others similarly situated.

vs

NEW YORK STOCK EXCHANGE,
~~LADENBURG-THALMANN & CO.~~,
ARTHUR LEVINE,
SOL LEIT,
ALLEN SOLOMON &
JOEL KUBIC
Ladenburg Thalmann & Co., a partnership
(amended 11-28-73)

Julien Blitz & Schlesinger
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(deft. Ladenburg Thalmann & Co.)

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Lee Feltman (deft. Sol Leit)
295 Madison Ave., NYC 10017 - 679-5450

Geist Netter & Marks (deft. Arthur Le
276 Fifth Ave., NYC 10001 - MU 4-6610

STATISTICAL RECORD

COSTS

J.S. 5 mailed

X

Clerk

J.S. 6 mailed

✓

Marshal

Basis of Action:

Violation of SEC Act
of 1934

Docket fee

Witness fees

Action arises from

Deposition

DATE

NAME OR
RECEIPT NO.

REC.

10/31/73 Julia B
11/1/73 UST
11/1/73 Julia
11/1/73 UST

15-

15-

15-

15-

15-

73 CIV.

| DATE | PROCEEDINGS |
|------------|--|
| Oct. 31-73 | Filed complaint & issued summons. |
| Nov. 8-73 | Filed pliffs amended complaint. Summons issued. |
| Nov. 27-73 | Filed deft's (NY Stock Exchange) affdvt. & notice of motion to direct pliffs. to file more definite statement in the form of a second amended complaint- ret. 12-7-73- |
| Nov. 27-73 | Filed deft's (NY Stock Exchange) memorandum in support of motion for a more definite statement. |
| Nov. 26-73 | Filed summons & return, served the following: New York Stock Exchange by Walfred J. Johnson- 11-2-73 Ladenburg Thalmann & Co. by Mr. Michael Mastangelo-11-12-73 Allen Solomon--unable to serve Arthur Levine-- unable to serve Sol Leit-unable to serve. Joel Kubic - unable to serve |
| Nov. 28-73 | Filed stip. & order amending the complaint and caption and extending time for deft. Ladenburg Thalmann & Co. Inc. to answer to 1-4-74--Brieant, J. |
| Nov. 28-73 | Filed affdvt. of Thomas H. Seiler re: service of memorandum of deft. NY Stock Exchange in support of motion |
| Dec. 6-73 | Filed affdvt. of David Jaroslawicz in opposition |
| Dec. 6-73 | Filed pliffs' memorandum in opposition |
| Dec. 7-73 | Filed Deft's' reply memorandum in support of motion for a more definite statement (N.Y. Stock Exchange, Inc.). |
| Nov. 29-73 | Filed amended summons & returns. Served: N.Y. Stock Exchange By Mr. Buch 11-15-73 Arthur Levine Not served Allen Solomon Not served Ladenburg Thalmann & Co. Mr. M. Masangelo 11-12-73 Sol Leit Not served Koel Kubic Not served |
| Dec. 7-73 | Filed memo end on motion filed Nov. 27-73. Motion Granted. An Amended complaint Shall be served and filed on or before Dec. 11-73. So Ordered. BRIEANT, J. |
| Dec. 13-73 | Filed 2nd amended complaint & jury demand |
| Dec. 19-73 | Filed affdvt. & order for service by an individual--Clerk |
| Dec. 27-73 | Filed pliffs' affdvt. & notice of motion to determine action as a class action- ret. 1-11-74-at 4:00 P.M. |
| Dec. 27-73 | Filed pliffs' memorandum in support of motion |
| Jan. 4-74 | Filed Stip and Order adjourning pltf class action determination motion until Feb. 28-74. BRIEANT, J. |
| Dec. 26-73 | Filed ANSWER & cross-claims of deft. Stock Exchange, Inc. |
| Jan. 7-74 | Filed ANSWER of deft. Ladenburg Thalmann & Co., Inc. |
| Jan. 17-74 | Filed stip. & order adjourning deposition of deft. NY Stock Exchange to 1-23-74- depositions of pliffs. adjourned to 2-5-74-pliffs' motion re: class determination adjourned to 3-1-74--Brieant, J. |
| Jan. 25-74 | Filed deft Ladenburg's amended answer & cross-claims. |
| Jan. 21-74 | Filed deft's notice to take deposition & request to produce. |
| Feb. 1-74 | Filed pliffs' notice to take deposition |
| Feb. 5-74 | Filed order appointing individual for service--Clerk |
| Feb. 5-74 | Filed ANSWER of deft. Exchange to cross-claims of deft. Ladenburg Thalmann & Co |
| Feb. 6-74 | Filed amended summons & return, served the following: Sol Leit--unable to serve Allen Solomon-by Mrs. Solomon-1-10-74 Arthur J. Levine-unable to serve Joel Kubic by Mrs. J. Kubic-12-26-73 |

////////

cont'd on page 2

| DATE | FILINGS--PROCEEDINGS | AMOUNT REPORTED ENCLOSURE RETURN |
|------------------|---|--|
| Feb. 7-74 | Filed ANSWER and cross-claim of deft. Alan C. Solomon | NKLN |
| Feb. 14-74 | Filed affdvt. of service by mail-re: answer & cross-claim | |
| Feb. 14-74 | Filed affdvt. of service of answer & cross-claims | |
| Feb. 19-74 | Filed ANSWER of deft. NY Stock Exchange, Inc. to cross-claim of deft. Alan C. Solomon | MTI |
| Feb. 20-74 | Filed ANSWER of deft. Ladenburg Thalmann & Co. to cross-claim of Alan C. Solomon | |
| Feb. 25-74 | Filed ANSWER of deft. Sol Leit | |
| Feb. 27-74 | Filed order referring action for all pre-trial purposes to Hon. Harold J. Raby, a Magistrate of this Court--and take such other proceedings as he may deem appropriate in order that the parties will be prepared to proceed on 4-26-74- with their motion to determine whether this litigation may be maintained as a class action--So ordered--Brieant, J.-mailed notice. | |
| Mar. 1-74 | Filed affdvt. of service answer & crossclaims | |
| Mar. 1-74 | Filed ANSWER of deft Alan C. Solomon to cross-claims of deft N.Y. Stock Exchange. | NKLNK& |
| Mar. 1-74 | Filed ANSWER of deft Alan C. Solomon to cross-claims of deft Ladenburg Thalmann & Co. | NKLNK& |
| Mar. 5-74 | Filed affdvt. of service of answer & cross-claim of deft. Alan Solomon | |
| Mar. 5-74 | Filed ANSWER of deft. Arthur Levine | GN&M |
| <i>FEB 26-74</i> | <i>Pre-trial conference held</i> | |
| <i>3-11-74</i> | <i>PRE-TRIAL CONFERENCE BY - Mag. Raby</i> | |
| <i>3-12-74</i> | <i>" " " " " "</i> | |
| Mar. 8-74 | Filed ANSWER of deft Sol Leit to cross-claims of New York Stock Exchange. | LF |
| Mar. 8-74 | Filed ANSWER of Sol Leit to cross-claim of Alan C. Solomon. | LF |
| Mar. 18-74 | Filed ANSWER of deft. Joel Kubie to 2nd amended complaint | FF |
| Mar. 15-74 | Filed affdvt. of service by mail of answer & cross-claim of deft. A. Solomon. | |
| Mar. 25-74 | Filed deft's (Arthur Levine) affdvt in opposition to determination of class action. | |
| Mar. 26-74 | Filed deft's (Ladenburg Thalmann & Co.) notice to take deposition of Morris Berro | |
| Mar. 26-74 | Filed affdvt. of service of answer & crossclaims of the NY Stock Exchange | |
| Mar. 29-74 | Filed ANSWER of deft. Arthur J. Levine to cross-claims of deft. NY Stock Exchange | |
| Apr. 2-74 | Filed pliffs' memorandum in support of request for rulings. | |
| Apr. 2-74 | Filed memorandum of deft. NY Stock Exchange in support of request for rulings | |
| Apr. 2-74 | Filed reply memorandum of deft. NY Stock Exchange in support of request for rulings | |
| Apr. 2-74 | Filed memorandum & order re: rulings on the various questions cited in the within memorandum constitute an order of this Court--No settlement is necessary--Magistrate Raby---m.n. | |

| DATE | FILINGS - PROCEEDINGS | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---------|---|---|
| 29-74 | Filed ANSWER of deft. Arthur J. Levine to cross-claims of NY Stock Exchange - error | |
| 4/10-74 | for trial conf. held by mag. Kirby. | |
| 5-15-74 | Filed Stip and order adjourning motion for class action until 5-3-74. BRIEANT, J. | |
| 5-17-74 | Filed stip and order of discontinuance (partial): Pltfs. Margulies, S. Louis Margulies & Marilyn Margulies discontinue action against N.Y. Stock Exchange, Ladenburg, Thalmann & Co., Arthur Levine, Sol Leit, Allen Solomon and Joel Kubie. BRIEANT, J. | |
| 5-24-74 | Filed deft Exchange's affdvt & notice of motion for summary judgment. Ret. 5-3-74. | |
| 5-24-74 | Filed deft Exchange's memo in support of motion for summary judgment, & in opposition to motion for class action certifi- cation. | |
| 6-74 | Filed stip. & order adjourning pltffs' motion for class action determination and defts' motion for summary judgment to 5-10-74--Brieant, J. | |
| 6-8-74 | Filed pltffs affdvt in opposition to motion for summary judgment. | |
| 6-8-74 | Filed pltffs memo of law in opposition to motion for summ. judgt. | |
| 6-8-74 | Filed deft (Ladenburg Thalmann) affdvt in opposition to motion for class action. | |
| 6-8-74 | Filed deft (Ladenburg's) memo of law. | |
| 6-9-74 | Filed pltffs affdvt in support of motion for class action determination. | |
| 6-9-74 | Filed pltffs reply memo of law in support of motion for class action determination. | |
| 6-21-74 | Filed defts. supplemental memo. | |
| 6-21-74 | Filed defts. reply memo in support of motion for summary judgment. | |
| 6-30-74 | Filed pltffs supplemental memo of law. | |
| 6-21-74 | Filed transcript of record of proceedings, dated MAY 21-1974 | |
| 6-23-74 | Filed Memorandum & Order. For the reason set forth in the memorandum summary judgment is granted, & the complt is dismissed as to all defts. The motion to declare a class action is denied as moot. Settle a final Judgment on notice.....BRIEANT, J. m/n | |
| 6-27-74 | Filed final judgment & Order that pltffs motion to maintain class action is dismissed. Defts N.Y. Stock Exchange & Ladenburg Thalmann's motion for summary judgment is granted with respect to all defts. Second amended complt is dismissed as to all defts & judgment entered in favor of all defts & against the pltffs.....STEWART, J. Judgment Entered, 8-7-74.....Clerk. m/n | |

~~Page #4~~

| Page #4 | | CLERK'S FEES | | AMOUNT REPORT EMOLUMENTS RETURNED |
|-----------|---|--------------|-----------|-----------------------------------|
| DATE | FILINGS-PROCEEDINGS | PLAINTIFF | DEFENDANT | |
| Aug 29-74 | Filed Pltffs' Notice of Appeal to USCA from the final judgment, filed 8-7-74, dismissing the complaint.....Copies mailed to firms listed-8-30-74..... Milbank, Tweed, Hadley & McCoy one Chase Man. Plaza, NYC----- Rosenman Colin Kaye Petscheck Freund & Emil, 575 Madison Ave., NYC ----- Lee Feltman, esq. 295 Madison Ave., NYC-----Finley Kumble, Heine, Under & Gnutma 477 Madison Ave., NYC-----Nickerson, Kramer, Lowenstein, Nessen Kamin & Soll 919 Third Ave., NYC-----Geist, Netter & Marks, 276 Fifth Ave., NYC/ | | | |
| SEP 6 74 | Filed transcript of record of proceedings, dated MAY 31, 1974 | | | |
| Oct. 3-74 | Filed notice that original record on appeal has been certified & transmitted to the USCA. | | | |

SECOND AMENDED COMPLAINT (Filed December 13, 1973)

6a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NORMAN RICH, SHELDON SCHIFF and HOWARD
SCHIFF, as trustees of the West Side
Corp. Profit Sharing Plan, SIMON MARGULIES,
LOUIS MARGULIES, MARILYN MARGULIES, CHARLES
SHURPIN, and LILLIAN SHURPIN, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

-against-

NEW YORK STOCK EXCHANGE, LADENBURG
THALMANN & CO., ARTHUR LEVINE, SOL
LEIT, ALLEN SOLOMON and JOEL KUBIE,

Defendants.
-----X

73 CIV. 4642
C.L.B.

SECOND AMENDED
COMPLAINT

Class Action

Plaintiffs demand
trial by jury

Plaintiffs, by their attorneys, JULIEN BLITZ &
SCHLESINGER, P.C., complaining of the defendants, upon information
and belief, allege as follows:

JURISDICTION AND VENUE

1. Plaintiff-trustees are trustees of the West
Side Corp., a corporation duly formed and existing under and by
virtue of the laws of the State of New York. The Profit Sharing
Plan is a plan organized by the said corporation for the benefit
of its employees.

2. At all times hereinafter mentioned, plaintiff
SIMON MARGULIES maintained a brokerage account for securities
with Weis Securities, Inc. (WEIS).

3. At all times hereinafter mentioned, plaintiff
LOUIS MARGULIES maintained a brokerage account for securities
with WEIS.

4. At all times nereinafter mentioned, plaintiff MARILYN MARGULIES maintained a brokerage account for securities with WEIS.

5. At all times hereinafter mentioned, plaintiff CHARLES SHURPIN maintained a brokerage account for securities with WEIS.

6. At all times hereinafter mentioned, plaintiff LILLIAN SHURPIN maintained a brokerage account for securities with WEIS.

7. The defendant, NEW YORK STOCK EXCHANGE, is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

8. The defendant, LADENBURG, THALMANN & CO., is a partnership engaged in the securities business with its principal place of business in the State of New York.

9. At all times hereinafter mentioned, ARTHUR LEVINE was the Chairman of the Board of WEIS.

10. At all times hereinafter mentioned, SOL LEIT was the President of WEIS.

11. At all times hereinafter mentioned, ALLEN SOLOMON was the Treasurer of WEIS.

12 At all times hereinafter mentioned, JOEL KUBIE was the Controller of WEIS.

13. Jurisdiction of this Court is based upon 15 U.S.C. 78aa, and the rules of pendent jurisdiction.

14. Venue is properly situated in the United States District Court for the Southern District of New York since the

defendants have their principal places of business within the Southern District of New York.

8a

CLASS ACTION ALLEGATIONS

15. This action is brought as a class action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure.

16. Plaintiffs are bringing this action on their own behalf and on behalf of all other persons similarly situated who are and were customers of WEIS during April and May of 1973.

17. Upon information and belief, there were approximately 35,000 such persons who were customers of WEIS during the aforesaid period.

18. The members of the class are so numerous that it is impractical to bring them all in front of this Court. There are basic common questions of law and fact involved herein with respect to all members of the class which questions predominate. The common questions of law and fact all arise out of the acts complained of. The claims alleged by the plaintiffs are, if substantiated, applicable to every member of the class. The claims of the plaintiffs are typical of the class, and the plaintiffs will fairly and adequately represent the interests of the class. If separate cases are started by each of the individual customers of WEIS, there is a possibility of conflicting judgments being issued by various courts. This class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

19. Plaintiffs have been gravely injured and deprived of their property as a result of the defendants' actions and have an interest in the success of this litigation and will

fairly and adequately protect the interests of the class as a whole.

9a

20. This action is not being brought as a class action so as to collusively confer jurisdiction upon the Court which it otherwise would not have.

AS AND FOR A FIRST CAUSE OF ACTION

21. At all times hereinafter mentioned, WEIS was a New York Corporation engaged in the securities business.

22. At all times hereinafter mentioned, the defendant NEW YORK STOCK EXCHANGE was a national securities exchange registered with the SEC pursuant to 15 U.S.C. 78f.

23. At all times hereinafter mentioned, WEIS was a member of the defendant NEW YORK STOCK EXCHANGE and subject to the rules and regulations of the NEW YORK STOCK EXCHANGE as required by the Securities Exchange Commission, and 15 U.S.C. 78f.

24. At all times hereinafter mentioned, LADENBURG THALMANN & CO., was a member of the defendant NEW YORK STOCK EXCHANGE, and subject to the rules and regulations of the NEW YORK STOCK EXCHANGE as required by the Securities Exchange Commission, and 15 U.S.C. 78f.

25. Pursuant to 15 U.S.C. 78f the defendant NEW YORK STOCK EXCHANGE undertook to discipline and police the conduct of its members in accordance with just and equitable principles of trade.

26. At all times hereinafter mentioned, during April and May, 1973, plaintiffs NORMAN RICH, SHELDON SCHIFF and HOWARD SCHIFF, as trustees of the West Side Corp. Profit Sharing

Plan had fully paid for all the securities it had purchased from WEIS and had allowed the said securities to remain in the possession of WEIS as custodian of the said securities.

27. At all times hereinafter mentioned, plaintiffs NORMAN RICH, SHELDON SCHIFF and HOWARD SCHIFF, as trustees of the West Side Corp. Profit Sharing Plan allowed their securities to remain in the possession of WEIS in reliance upon the fact that WEIS was a member of the NEW YORK STOCK EXCHANGE and its activities would be properly policed by the NEW YORK STOCK EXCHANGE.

28. At all times hereinafter mentioned, during April and May, 1973, plaintiffs SIMON MARGULIES, LOUIS MARGULIES, MARILYN MARGULIES, CHARLES SHURPIN and LILLIAN SHURPIN maintained margin accounts with WEIS.

29. That the plaintiffs had done so in reliance upon the fact that WEIS was a member of the defendant NEW YORK STOCK EXCHANGE and as such was subject to all the rules and regulations of the EXCHANGE and was being adequately and properly policed by the defendant NEW YORK STOCK EXCHANGE.

30. That in or about April and May, 1973, the defendant NEW YORK STOCK EXCHANGE, LADENBURG THALMANN & CO., and the individual defendants had knowledge that WEIS was in violation of the net capital requirements and was in financial difficulty.

31. That the defendant NEW YORK STOCK EXCHANGE, LADENBURG THALMANN & CO., and the individual defendants conspired and made use of the knowledge as set out above which was obtained in their fiduciary capacity and as a National Exchange, registered

pursuant to 15 U.S.C. 78f, to notify certain privileged customers of WEIS of that company's difficult financial position, and of its imminent dissolution and advised and aided those privileged customers to transfer their accounts to various other brokerage firms, including the firm of the defendant LADENBURG THALMANN & CO., -- all of which were to the detriment of the plaintiffs and all others similarly situated.

32. That the aforesaid act on the part of the defendant NEW YORK STOCK EXCHANGE, violated the provisions of the Securities Exchange Act of 1934 and the various rules and regulations promulgated by the Securities and Exchange Commission pursuant to that Act. In particular the defendant NEW YORK STOCK EXCHANGE violated section 15 U.S.C. 78f; and 15 U.S.C. 78j.

AS AND FOR A SECOND CAUSE OF ACTION

33. Plaintiffs repeat and reiterate paragraphs "1" through "32" inclusive, of the complaint with the same force and effect as if fully set forth at length herein.

34. That the defendant NEW YORK STOCK EXCHANGE had knowledge of all the aforesaid facts when it advised certain privileged customers of WEIS of that company's financial difficulties and aided those privileged customers to remove their accounts, especially margin accounts, from WEIS to various other brokerage firms. That the said transfers were made on the basis of "inside information" obtained by the STOCK EXCHANGE and with the knowledge and/or collusion of LADENBURG THALMAN & CO., and of the individual defendants.

35. That the aforesaid acts were in violation of the Securities Exchange Act of 1934. In particular 15 U.S.C. 78j, and Rule 10b-5 promulgated thereunder and violated various other rules and regulations which were promulgated by the Securities and Exchange Commission. 12a

AS AND FOR A THIRD CAUSE OF ACTION

36. Plaintiffs repeat and reiterate paragraphs "1" through "35" inclusive, of the complaint with the same force and effect as if fully set forth at length herein.

37. That the defendant LADENBURG THALMANN & CO., had knowledge of all the aforesaid facts when it aided in the transfer of and accepted the accounts of those persons who were their "tippees" and "tippees" of the defendant NEW YORK STOCK EXCHANGE and the individual defendants and that the defendant LADENBURG THALMANN & CO., knowingly participated and joined in the aforesaid violations of their own and the defendant NEW YORK STOCK EXCHANGE'S fiduciary obligations.

38. That by acting as aforesaid, LADENBURG THALMANN & CO., violated the provisions of the Securities Exchange Act of 1934, and the various rules and regulations promulgated by the Securities and Exchange Commission pursuant to that Act, and in particular 15 U.S.C. 78j.

AS AND FOR A FOURTH CAUSE OF ACTION

39. Plaintiffs repeat and reiterate paragraphs "1" through "38" inclusive, of the complaint with the same force and effect as if fully set forth at length herein.

40. That pursuant to 15 U.S.C. 78f, the defendant NEW YORK STOCK EXCHANGE filed a registration statement with

the Securities and Exchange Commission, in which it contracted, ^{13a}
among other things, to discipline the conduct of its members.

41. That the plaintiffs and all others similarly situated were the intended beneficiaries of that contract.

42. That by acting as aforesaid the defendant NEW YORK STOCK EXCHANGE breached the aforesaid contract by acting as set out above to the detriment of the plaintiffs.

AS AND FOR A FIFTH CAUSE OF ACTION

43. Plaintiffs repeat and reiterate paragraphs "1" through "42" inclusive, of the complaint with the same force and effect as if fully set forth at length herein.

44. That pursuant to 15 U.S.C. 78f, the defendant NEW YORK STOCK EXCHANGE filed a registration statement with the Securities and Exchange Commission, in which it contracted, among other things, to discipline the conduct of its members and represented to the public at large that it would adequately and properly discipline and police its members.

45. That the plaintiffs had maintained their accounts with WEIS in reliance upon the fact that WEIS was a member of the defendant NEW YORK STOCK EXCHANGE and thus would have its activities adequately and properly policed by the STOCK EXCHANGE.

46. That upon registering with the Securities and Exchange Commission the defendant NEW YORK STOCK EXCHANGE had

intended for the plaintiffs and others similarly situated to rely.

47. That instead of carrying out its duties as set forth in its registration forms, filed with the Securities and Exchange Commission, the defendant NEW YORK STOCK EXCHANGE failed to adequately police WEIS although it had knowledge that WEIS was in violation of various sections of the Securities and Exchange Act of 1934, and the rules and regulations of the Securities and Exchange Commission promulgated thereunder and, instead defendant NEW YORK STOCK EXCHANGE, itself, violated its fiduciary duty for the benefit of itself and its "tippees".

48. That the defendant NEW YORK STOCK EXCHANGE had knowledge that by acting as aforesaid the plaintiffs and others similarly situated would be injured.

49. By reason of the foregoing, the plaintiffs and all other customers of WEIS similarly situated were damaged in that they were unable to receive the full value of the securities which they had deposited with WEIS; and by reason of the fact that WEIS was put into receivership, the plaintiffs had certain securities sold out for them by the receiver at prices which the plaintiffs would not have sold had they withdrawn their accounts from WEIS before WEIS was put into receivership and that the plaintiffs were unable to obtain their securities and trade in them and were otherwise damaged.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

a. that the plaintiffs recover all damages which they have suffered due to the aforesaid acts on the part of the defendants.

b. that the defendants and their "tippees" be ordered to pay over to the plaintiffs all monies which they have profited by reason of their illegal transactions.

c. that the plaintiffs have such other and further relief as may be just and proper together with attorneys' fees, accountants' fees, and the costs and disbursements of this action.

JULIEN BLITZ & SCHLESINGER, P.C.
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New York, New York
(212) 952-8020

By: Stuart A. Schlesinger
STUART A. SCHLESINGER

ANSWER AND CROSS-CLAIMS OF NEW YORK STOCK EXCHANGE, INC.
UNITED STATES DISTRICT COURT (Filed December 26, 1973)

16a

SOUTHERN DISTRICT OF NEW YORK

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NORMAN RICH, et al., :
Plaintiffs, : 73 Civ. 4642 (C.L.B.)
-against- : ANSWER AND CROSS-
NEW YORK STOCK EXCHANGE, et al., : CLAIMS OF NEW YORK
Defendants. : STOCK EXCHANGE, INC.
-----x

Defendant New York Stock Exchange, Inc. (the "Exchange")
by its attorneys, Milbank, Tweed, Hadley & McCloy, for answer to
the second amended complaint:

1. Denies knowledge or information sufficient to form
a belief as to the truth of each and every allegation contained
in paragraphs 1, 2, 3, 4, 5 and 6.

2. Denies each and every allegation contained in
paragraph 8, except admits that defendant Ladenberg, Thalmann &
Co., Inc. ("Ladenberg") is a corporation engaged in the securities
business with its principal place of business in New York, New
York.

3. Denies each and every allegation contained in
paragraphs 9, 10 and 11, except admits that at all times mentioned
in the second amended complaint, until removal on or about May 10,
1973, Arthur J. Levine was chairman of the board of directors of
Weis Securities Inc. ("Weis"), Sol Leit was president of Weis,
and Alan Solomon was treasurer of Weis.

4. Denies each and every allegation contained in
paragraph 12, except admits that Joel Kubie was controller of
Weis until approximately March, 1973.

5. Denies each and every allegation contained in paragraph 13, except admits that jurisdiction is alleged to be based upon section 27 of the Securities Exchange Act of 1934 15 U.S.C. § 78aa, and the rules of pendent jurisdiction.

6. Denies each and every allegation contained in paragraphs 15, 16, 17, 18, 19 and 20, except admits that plaintiffs purportedly bring this action as a class suit on behalf of themselves and of all other persons who were customers of Weis during April and May, 1973, and that there are approximately 35,000 such persons.

7. Denies each and every allegation contained in paragraphs 23 and 24, except admits that Weis and Ladenberg were at all times mentioned in the second amended complaint member organizations of the Exchange subject to its rules and regulations.

8. Denies each and every allegation contained in paragraph 25, except admits that pursuant to Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, the Exchange is registered as a national securities exchange, and refers to said statute for an accurate description of the Exchange's obligations thereunder.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 26, 27, 28 and 29.

10. Denies each and every allegation contained in paragraphs 30, 31, 32, 34, 35, 37, 38, 40, 41, 42 and 44.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 45.

12. Denies each and every allegation contained in paragraphs 46, 47, 48 and 49.

FIRST CROSS-CLAIM AGAINST
DEFENDANTS ARTHUR J. LEVINE,
SOL LEIT, ALAN SOLOMON AND
JOEL KUBIE

18a

13. At all times hereinafter mentioned, defendants Arthur J. Levine, Sol Leit, Alan Solomon and Joel Kubie were officers or directors of Weis.

14. On information and belief, commencing on or about April, 1971, defendants Levine, Leit, Solomon and Kubie engaged in a practice of falsely and fraudulently concealing expense items on the books and records of Weis. In statements filed with the Exchange and examinations and audits of Weis, said defendants falsely and fraudulently stated and represented to the Exchange that its net capital position complied with applicable requirements.

15. The representations so made by said defendants were false, and, in truth, the facts were that the capital position of Weis was understated and Weis was in violation of all applicable requirements in respect thereto.

16. When the representations and statements were so made, they were known by said defendants to be false and were made by them with intent to deceive and defraud the Exchange and to prevent it from taking corrective or disciplinary action against Weis and said defendants.

17. The Exchange, at the time said representations and statements were made, did not and reasonably could not know the truth regarding them, but believed that the representations and statements were true and relied upon them and was thereby prevented from taking corrective or disciplinary action against Weis and said defendants.

18. Any injuries sustained by the plaintiffs as alleged in the second amended complaint were solely caused by the false and fraudulent conduct and representations of said defendants.

SECOND CROSS-CLAIMS AGAINST
DEFENDANTS ARTHUR J. LEVINE,
SOL LEIT, ALAN SOLOMON AND
JOEL KUBIE

19. Defendants Levine, Leit, Solomon and Kubie, as officers and directors of Weis, a member of the Exchange, contracted with the Exchange, in consideration of membership by Weis on the Exchange and approval by the Exchange of said defendants as officers and/or employers of Weis, to comply, among other things, with its Constitution and its rules and regulations and with the rules and regulations of the Securities and Exchange Commission.

20. Said defendants have failed and neglected to perform the conditions of the said contract in that they have made material misstatements to the Exchange and failed to immediately notify the Exchange when the net capital requirements of Weis did not equal or exceed the minimum required.

21. Any injuries sustained by the plaintiffs as alleged in the second amended complaint were solely caused by the wrongful breach of said contract by said defendants.

WHEREFORE, the Exchange demands (a) judgment dismissing the second amended complaint, with costs and disbursements, (b) judgment that if there is any liability to the plaintiffs, the defendants Levine, Leit, Solomon and Kubie are solely liable to the plaintiffs, and (c) in the event the plaintiffs obtain judgment against the Exchange that defendants Levine, Leit,

Solomon and Kubie be held primarily liable, and that the Exchange have judgment over and against said defendants.

Dated: New York, New York
December 24, 1973

MILBANK, TWEEED, HADLEY & McCLOY

By S. J. Hadley
(A Member of the Firm)

1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant-
cross-claimant
New York Stock Exchange, Inc.

DEFENDANT LADENBURG'S AMENDED ANSWER AND CROSS-CLAIMS
UNITED STATES DISTRICT COURT (Filed January 25, 1974)
SOUTHERN DISTRICT OF NEW YORK

21a

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NORMAN RICH, et al., : 73 Civil 4642
Plaintiffs, : (C.L.B.)
-against- : AMENDED ANSWER AND
NEW YORK STOCK EXCHANGE, et al., : CROSS-CLAIMS OF
Defendants. : DEFENDANT LADENBURG
: THALMANN & CO. INC.
-----x

Defendant Ladenburg Thalmann & Co. Inc. ("Ladenburg"),
(sued herein as Ladenburg Thalmann & Co.) by its attorneys,
Rosenman Colin Kaye Petschek Freund & Emil, for its amended
answer and cross-claims to the second amended complaint ("the
complaint") herein (it appearing that only the so-called
third cause of action therein is alleged against defendant
Ladenburg), alleges as follows:

1. Denies knowledge or information sufficient to
form a belief as to the truth of each and every allegation
contained in paragraphs 1,2,3,4,5,6,7,13,17,20,25,26,27,28,
29,40,41,42,44,45,46,47,48 and 49 of the complaint.

2. Denies each and every allegation contained in
paragraph 8 of the complaint, except admits that defendant
Ladenburg is a corporation engaged in the securities
business with its principal place of business in the State
of New York.

3. Denies knowledge or information sufficient to
form a belief as to the truth of each and every allegation
contained in paragraphs 9, 10, 11 and 12 of the complaint,

except admits that one or more of the defendants Arthur Levine, Sol Leit, Allen Solomon and Joel Kubie, were at various times officers or directors of Weis Securities Inc. ("Weis").

4. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 14 of the complaint, except admits that defendants Ladenburg and New York Stock Exchange ("Exchange") have their principal places of business within the Southern District of New York.

5. Denies each and every allegation contained in paragraphs 15 and 16 of the complaint, except admits that plaintiffs purport to bring this action as a class action on their own behalf and on behalf of others.

6. Denies each and every allegation contained in paragraphs 18,19,31,32,34,35,37 and 38 of the complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 21 of the complaint, except admits that Weis was engaged in the securities business.

8. Denies each and every allegation contained in paragraphs 23 and 24 of the complaint, except admits that Weis and defendant Ladenburg were members of defendant Exchange and subject to the rules and regulations thereof.

9. Denies each and every allegation contained in paragraph 30 of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of said allegations insofar as they relate to defendants other than defendant Ladenburg.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 40, 41 and 42 of the complaint.

11. Denies, denies knowledge or information, and admits the allegations of paragraphs 33, 36, 39 and 43 of the complaint to the same extent as it has denied, denied knowledge or information, and admitted said allegations hereinabove.

FOR A DEFENSE

12. The complaint fails to state a claim against defendant Ladenburg upon which relief can be granted.

FOR A FIRST CROSS-CLAIM
AGAINST DEFENDANTS LEVINE
LEIT, SOLOMON AND KUBIE

13. If, as alleged in the complaint herein, accounts of Weis were transferred from it to defendant Ladenburg at a time when Weis was in financial difficulty and/or was not in compliance with applicable net capital requirements, it was the result of the matters set forth below:

(a) Commencing in or about April 1971, defendants Levine, Leit, Solomon and Kubie (who were at all pertinent times officers and directors of Weis and who are hereinafter collectively referred to as the "Weis defendants"), or one or more of them, and one or more other persons, knowingly and wilfully engaged or participated in or aided and abetted a plan, scheme or conspiracy to, and did, falsify the books, records and financial statements of Weis.

(b) Among the acts and omissions committed by the Weis defendants, or one or more of them, in furtherance of said plan, scheme or conspiracy (the full extent of such acts and omissions being presently unknown to defendant Ladenburg) were the concealment of items of expense and the overstatement of items of income in said books, records and financial statements.

(c) As part of said plan, scheme or conspiracy, the Weis defendants, or one or more of them, knowingly, wilfully, and in order to induce defendant Ladenburg to accept the transfer to it of accounts of Weis, gave or caused to be given to defendant Ladenburg financial statements and records, and made or caused to be made to defendant Ladenburg statements, all of which contained (unknown to defendant Ladenburg) false and misleading representations and omitted to state material facts necessary to make them not false and misleading, and all of which falsely and fraudulently represented (unknown to defendant Ladenburg) that the net capital position of Weis complied with applicable net capital requirements and that Weis was not in financial difficulty.

(d) By reason of said false and fraudulent representations, upon which defendant Ladenburg relied, and the false and fraudulent nature of which was unknown to defendant Ladenburg, defendant Ladenburg was induced to and did accept the transfer to it of certain accounts of Weis.

14. If plaintiffs recover judgment herein against defendant Ladenburg by reason of any acts, transactions or omissions alleged in the complaint, or by reason of any acts, transactions or omissions committed by the Weis defendants, or one or more of them, pursuant to or in furtherance of said plan, scheme or conspiracy, such judgment will have been brought about and caused wholly or primarily by the acts, transactions or omissions of the Weis defendants, or one or more of them, and not by, or only secondarily by, any acts, transactions or omissions of defendant Ladenburg.

15. By reason of the foregoing, defendant Ladenburg is entitled to indemnification or contribution from the Weis defendants, or from one or more of them, for all or part of any judgment herein recovered against defendant Ladenburg.

16. By reason of the foregoing, defendant Ladenburg has incurred and will continue to incur damages, including legal expenses in connection with this action, in amounts presently unknown.

17. If, as alleged in the complaint herein, accounts of Weis were transferred from it to defendant Ladenburg at a time when Weis was in financial difficulty and/or not in compliance with applicable net capital requirements, and if defendant Exchange knew of said financial difficulty and non-compliance, and if plaintiffs recover judgment herein against defendant Ladenburg by reason of any acts, transactions or omissions alleged in the complaint herein, such judgment will have been brought about and caused wholly or primarily by the acts, transactions and omissions of defendant Exchange and not by any acts, transactions or omissions of defendant Ladenburg.

18. By reason of the foregoing, defendant Ladenburg is entitled to indemnification or contribution from defendant Exchange, for all or part of any judgment herein recovered against defendant Ladenburg.

19. By reason of the foregoing, Ladenburg has incurred and will continue to incur damages, including legal expenses in connection with this action in amounts presently unknown.

FOR A THIRD CROSS-CLAIM
AGAINST ALL DEFENDANTS
OTHER THAN DEFENDANT
LADENBURG

20. If plaintiffs recover judgment herein against defendant Ladenburg by reason of any of the acts, transactions or omissions alleged in the complaint, such judgment will have been brought about and caused wholly or primarily

by the acts, transactions and omissions of the defendants
named herein, other than defendant Ladenburg, or one or
more of them, and not by any acts, transactions or omissions
of defendant Ladenburg. 27a

21. By reason of the foregoing, Ladenburg is entitled
to indemnification or contribution from said other
defendants, or from one or more of them, for all or part
of any judgment herein recovered against Ladenburg, under
the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)
or otherwise.

WHEREFORE, defendant Ladenburg demands judgment as
follows:

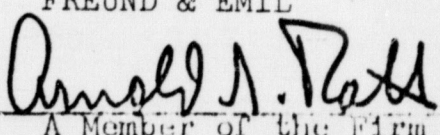
A. Dismissing the complaint and this action as to
defendant Ladenburg;

B. Awarding to defendant Ladenburg indemnification
or contribution against each of the other defendants herein
in such amounts as may be proper, pursuant to the cross-
claims alleged herein, together with its damages, including
legal expenses;

C. Awarding to defendant Ladenburg interest as
allowed by law and the costs and disbursements of this
action; and

D. Granting to defendant Ladenburg such other relief
as is just and proper.

ROSENMAN COLIN KAYE PETSCHKE
FREUND & EMIL

By 
A Member of the Firm
Attorneys for Defendant
Ladenburg Thalmann & Co. Inc.
575 Madison Avenue
New York, New York 10022

DEFENDANT EXCHANGE'S NOTICE OF MOTION FOR SUMMARY JUDGMENT
UNITED STATES DISTRICT COURT (Filed April 24, 1974)

28a

SOUTHERN DISTRICT OF NEW YORK

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NORMAN RICH, et al., :
Plaintiffs, : 73 Civ. 4642 C.L.B.
-against- : DEFENDANT EXCHANGE'S
NEW YORK STOCK EXCHANGE, et al., : NOTICE OF MOTION FOR
Defendants. : SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Russell E. Brooks, sworn to April 23, 1974 and of James W. Giddens, sworn to April 23, 1974, and all pleadings and prior proceedings herein, the undersigned will move this Court at Room 1505, U.S. Courthouse, Foley Square, New York, N.Y. on May 3, 1974 at 9:30 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of the Exchange and against plaintiffs on the ground that there are no genuine issues of material fact that plaintiffs have no provable damages, and for such other relief as may be proper.

PLEASE TAKE FURTHER NOTICE that any answering affidavits and memoranda must be served at least three days before the return day of this motion.

Dated: New York, N.Y.
April 23, 1974

Yours, etc.

MILBANK, TWEED, HADLEY & McCLOY

By Russell E. Brooks
A Member of the Firm
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for defendant
New York Stock Exchange, Inc.

TO:

JULIEN BLITZ & SCHLESINGER, P.C.
2 Lafayette Street
New York, N.Y. 10007
Attorneys for plaintiffs

ROSENMAN COLIN KAYE PETSCHKE FREUND & EMIL
575 Madison Avenue
New York, N.Y. 10022
Attorneys for defendant
Ladenburg Thalmann & Co. Inc.

FINLEY, KUMBLE, HEINE, UNDERBERG & GRUTMAN
477 Madison Avenue
New York, N.Y. 10022
Attorneys for defendant
Joel Kubie

LEE FELTMAN, ESQ.
295 Madison Avenue
New York, N.Y.
Attorney for defendant
Sol Leit

NICKERSON, KRAMER, LOWENSTEIN, KAMIN & SOLL
919 Third Avenue
New York, N.Y.
Attorneys for defendant
Alan C. Solomon

GEIST, NETTER & MARKS
276 Fifth Avenue
New York, N.Y. 10001
Attorneys for defendant
Arthur J. Levine

AFFIDAVIT OF RUSSELL E. BROOKS IN SUPPORT OF MOTION
UNITED STATES DISTRICT COURT

30a

SOUTHERN DISTRICT OF NEW YORK

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NORMAN RICH, et al., :

Plaintiffs, : 73 Civ. 4642 C.L.B.

-against- :

NEW YORK STOCK EXCHANGE, et al., : AFFIDAVIT IN SUPPORT
Defendants. : OF MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION
TO CLASS ACTION MOTION

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RUSSELL E. BROOKS, being duly sworn, says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for New York Stock Exchange, Inc. (the "Exchange"). I am familiar with all pleadings and prior proceedings in this action.

2. This affidavit is submitted in support of the Exchange's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the ground that the plaintiffs have no provable damages and in opposition to the plaintiffs' motion for class action certification under Rule 23 of the Federal Rules of Civil Procedure.

3. Plaintiffs' amended their complaint once as a matter of right and a second time by order of the Court dated December 7, 1973 entered pursuant to a motion by the Exchange for a more definite statement. The second amended complaint, a copy of which is annexed as Exhibit A, is purportedly brought as a class action on behalf of 35,000 customers of Weis Securities Inc. ("Weis") similarly situated and seeks recovery of damages based upon alleged violations of the Securities Exchange Act of

1934 and for common law fraud and breach of contract. Named as defendants are the Exchange, Ladenburg Thalmann & Co. Inc. ("Ladenburg") and several officers and directors of Weis. The second amended complaint was brought by six plaintiffs. However, by stipulation and order dated April 16, 1974, plaintiffs Simon Margulies, Louis Margulies and Marilyn Margulies have discontinued with prejudice their action against the defendants.

4. Plaintiffs moved for class action certification on December 19, 1973, pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 11 of this Court, permitting the plaintiffs to maintain this lawsuit as a class action on behalf of all customers of Weis during April and May 1973.

5. Defendants Exchange and Ladenburg have taken depositions in this action of plaintiffs Charles Shurpin and Sheldon Schiff and Norman Rich, as trustees of the West Side Corp. Profit Sharing Plan (the "Plan"). Completion of those depositions, commenced in early February, was delayed by the failure of plaintiffs to produce the documents requested of them and by the need to obtain rulings on objections by plaintiffs' counsel to questions asked of plaintiffs during their depositions and to documents requested. This Court by order dated February 28, 1974, referred the case to Magistrate Raby for rulings on those objections and for the most part the Magistrate overruled the objections on April 2, 1974 and directed plaintiffs to answer the questions and produce the documents. Thus, the Exchange completed its pretrial examination of plaintiffs on April 16. Copies of the entire deposition transcripts of Shurpin, Schiff and Rich conducted before and after the Magistrate's ruling are submitted herewith.

6. Pursuant to a notice of deposition and request for production, the Exchange's entire files on Weis were produced

for the plaintiffs on February 6, 1974 and Robert Bishop, a senior vice president of the Exchange, appeared for examination. The deposition of Bishop was terminated by plaintiffs after about one-half day's examination and a cursory review of the Exchange's files. Copies of those documents requested by the plaintiffs were promptly furnished. Plaintiffs have sought no further examination of Bishop, or any other employee of the Exchange, or the Exchange's files, or examined any of the other defendants. A copy of the entire deposition transcript of Bishop is submitted herewith.

7. Certain documents were produced by plaintiffs pursuant to requests for production by defendants Exchange and Ladenburg and were identified in the course of their depositions. Some of those documents (as itemized below) are relied upon by the Exchange on its motion and copies thereof are annexed as Exhibit B:

a. Letter dated December 19, 1973 by William R. Shields of the Exchange, marked as Exchange Exhibit 48C for identification at page 180 of the transcript of the Shurpin deposition;

b. Account statement dated June 15, 1973 of the Plan for its account with Weis, marked as Exchange Exhibit 15D for identification at page 208 of the transcript of the Schiff deposition;

c. Remittance slips received by the Plan on the delivery of securities from its account with Weis, marked as Exchange Exhibits 6 and 25 for identification at pages 13 and 236, respectively, of the transcript of the Schiff deposition;

d. Account statement dated June 15, 1973 of Shurpin for his joint account with Weis, marked as Exchange Exhibit 50F

for identification at page 201 of the transcript of the Shurpin deposition;


33a

e. Account statement dated June 15, 1973 of Shurpin for his individual account with Weis, marked as Exchange Exhibit 53E for identification at page 211 of the transcript of the Shurpin deposition;


f. Account statement dated August 10, 1973 of Shurpin for his individual account with Weis, marked as Exchange Exhibit 53F for identification at page 211 of the transcript of the Shurpin deposition;

g. Remittance slips received by Shurpin on delivery of securities from his joint and individual accounts with Weis, marked as Exchange Exhibits 51 and 54 for identification at pages 205 and 214, respectively, of the transcript of the Shurpin deposition; and

h. Article from the New York Times dated November 1, 1973, marked as Exchange Exhibit 33 for identification at page 130 of the transcript of the Shurpin deposition.


Russell E. Brooks

Sworn to before me this
day of April, 1974.


PATRICIA WASSELL
NOTARY PUBLIC, State of New York
No. 31-4502112
Qualified in New York County
Commission Expires March 30, 1975

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - SECOND AMENDED COMPLAINT

34a

(Printed herein at page 6a).

EXHIBIT B - LETTER DATED DECEMBER 19, 1973 FROM WILLIAM R. SHIELDS TO ROBERT MILLSTONE

35a

New York Stock

Exchange

EC 26 1973

DIVISION OF MARKET REGULATION

Exchange

47's Def't's Ex. 43 C
4/12/73 19.7.4 Donna A. Metz For Ident

Mr. Robert Millstone
Securities and Exchange Commission
500 North Capitol St. N.W.
Washington, D.C. 20549

December 19, 1973

Dear Mr. Millstone:

In a recent telephone conversation, you inquired as to the circumstances surrounding the delivery of customer accounts by Weis Securities Inc. prior to its liquidation.

In the weeks preceeding the liquidation of Weis Securities Inc. intensive efforts were made to both determine the extent of the firm's financial difficulties and improve its capital position to ensure continued safety for all customers. One principal means of achieving this was a proposed merger with another member firm which included plans for the infusion of substantial additional capital. In addition to this proposal for an overall solution several intermediate steps were taken to improve the firm's net capital. These included the infusion of new capital together with a reduction in liabilities.

The delivery of accounts to other broker/dealers is a commonly used means of quickly reducing a firm's aggregate indebtedness and thereby reducing the amount of capital necessary to support such liabilities.

Weis Securities, Inc. proposed to take such action to ensure customer safety pending the merger. The Exchange concurred in the proposal as a technique to reduce liabilities which has been successful in

Exhibit B - Letter Dated December 19, 1973 From
William R. Shields to Robert Millstone

36a

Mr. Robert Millstone

December 19, 1973

Page 2

the past in restoring to stability financially troubled firms. In order to achieve the most significant improvement in the shortest period of time, the firm chose to deliver the accounts with the largest debit balances, to the firm with which it planned to merge.

Weis Securities, Inc. had previously delivered out unprofitable margin accounts and the accounts of another broker/dealer which Weis Securities Inc. was carrying on a fully disclosed basis.

Thus, the Exchange did not initiate the program of reducing indebtedness by delivering out accounts, nor did it play any role in selecting the accounts to be delivered out. The delivery of accounts prior to the liquidation was suggested and implemented by the firm with Exchange approval of such a technique to reduce the firm's liabilities and to ensure continued safety for all customers, not to afford favored treatment to any specific group.

Sincerely,

William R. Shields

FIRST
MANHATTAN
CO.

Investment
Management

WRITE FOR DESCRIPTIVE BOOKLET

MEMBERS NEW YORK STOCK EXCHANGE
WALL STREET, NEW YORK, N.Y. 10005
(212) 344-2225

Market Place: Protection for Big and Small

BY ROSE

The events leading up to the liquidation of Weis Securities, Inc., the first major brokerage firm to be dissolved under the new Federal investor protection law, suggest that the legislation, while helpful, is inadequate. And it makes possible prior preferential treatment, however inadvertent, for a failing firm's richer clients.

While it has been rumored ever since the onset of Weis's liquidation that the accounts of wealthy clients had been transferred intact to other brokers, this was not acknowledged by the New York Stock Exchange until last Friday, when it was learned that accounts with large debit balances had indeed been spared the stresses and losses of the Weis liquidation.

The exchange said that, without regard to size, it had suggested transfers in early May, when it was learned that Weis was threatened with failure. The liquidation came on May 24. At that time, Ladenburg Thalmann, a house much smaller than the 27-branch, 4002 salesman Weis firm, supposedly got all the transferred accounts, although rumors persist that at least one other house received one or more accounts.

The transfers were undertaken in a legitimate effort to reduce customers' margin indebtedness. This, in turn, would reduce Weis's indebtedness in that Weis, like all other brokerage firms, borrowed from banks to finance loans made to customers.

Large accounts were presumably chosen by Weis because a relatively few transfers would have a relatively large impact. One result was that when the firm was liquidated there were only 70 accounts remaining that

were less than fully protected under the dollar limits of the Securities Investor Protection Corporation. The legislation provides protection for \$50,000, of which no more than \$20,000 may be cash.

However, smaller customers, who were fully covered under the law, also lost something in some cases.

The failure occurred during a bear market. In fact, such failures occur most often during bear markets, when many brokers operate in the red. Stock prices in a bear market are usually at low levels.

Customers' shares held by Weis were sold—by banks, the trustee says, which had advanced Weis money collateralized by customers' shares. The money realized was disappointing. Each customer got a fraction of the remaining shares of a given stock left at Weis and cash for the balance of his holdings in that issue at May 24 prices.

Many customers, remembering perhaps that the Big Board had transferred all accounts of failing brokerage houses before the establishment of the S.I.P.C., were dissatisfied.

According to most of those who have complained, they would have kept their shares, given the opportunity, and thus at least would have been in the same relative position as before—sitting

with losses or profits they had no intention of realizing.

The situation was frustrating in other ways. The trustee, besieged with communications from many of the 35,000 or so Weis customers, had to rely on form letters in reply. And there was no way a form letter, however ex-

PLICIT and complete, could satisfactorily communicate the legal intricacies.

Here is a case in point. A Weis customer from East Orange, N. J., owned shares in a major savings and loan company in two separate Weis accounts. He received less than 100 of the several hundred shares in one account and cash at the May 24 close-out price for the remainder in that account. On the second account in which he also had shares, he received only cash—again at the May 24 price. He had had no intention of selling the shares, he says, and this was because he had a big loss in the shares. He knew that if the market moved characteristically this industry's shares would come back. And they did.

The investor says he is not a rich man and adds that he lost \$16,000 as a result of the liquidation, or a substantial part of his "life savings."

And what of those 70 customers whose accounts were not transferred though there was value in them in excess of the S. I. P. C. protection limits? They are stuck, or at best have lawsuits.

At present, customers of weak firms have no recourse but to transfer their accounts to firms that are stronger. Some firms—Merrill Lynch, Pierce, Fenner & Smith, Inc., and Dean Witter & Co.—offer an additional \$250,000 of insurance.

But the crux of the matter is that customers want their securities to be transferred intact, in cases of a brokerage-house failure.

This would mean changing the S.I.P.C. legislation so that accounts could be transferred immediately to sound houses so customers would be able to make changes in portfolios without interruption. This is what happened to the biggest Weis customers and to all accounts of failing brokerage firms under costly but statesmanlike conduct of the stock exchange before establishment of the S.I.P.C.

Who would pay for it? Possibly the customer. Possibly the broker. In any case, the cost should not be prohibitive—perhaps one half of 1 per cent of the account per annum—a small price to pay for continuity and safety.

This is not an idle matter. James Needham, chairman of the New York Stock Exchange, said in a speech yesterday that there were still 50 firms on the exchange's "early-warning list," which means that their capital positions are less than ideal.

The matter goes to the very heart of the confidence on which the securities business is built. Without confidence, the markets stagnate as the recent bear markets prove.

The brokerage customer, like his counterpart with money on deposit at the banks, needs full protection.

CUSTOMERS OF WEIS SUING FOR DAMAGES

Three stockholders who were customers of Weis Securities, Inc., filed a suit in Federal court here yesterday seeking damages for all losses, which they had deposited with the financially troubled brokerage company before it closed down last May 24.

The suit complained that Weis and the New York Stock Exchange notified "certain privileged customers" about the company's imminent dissolution and advised them to transfer their accounts to other brokerage houses.

Named as defendants were the stock exchange, top Weis officers and the brokerage house of Ladenburg, Thalmann & Co., Inc. The suit seeks to recover all damages suffered by 35,000 customers who were allegedly not notified and all profits made by those who the suit said were notified.

The plaintiffs are Norman Rich, Sheldon Schiff and Howard Schiff as trustees of the West Side Corporation Profit Sharing Plan, which bought securities from Weis and left them in Weis's custody.

AFFIDAVIT OF JAMES W. GIDDENS IN SUPPORT OF MOTION

38a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
NORMAN RICH, et al., :
Plaintiffs, : 73 Civ. 4642 C.L.B.
-against- : AFFIDAVIT
NEW YORK STOCK EXCHANGE, et al., :
Defendants. :

----- x
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES W. GIDDENS, being duly sworn, deposes and says:

1. I am a member of the firm of Hughes Hubbard & Reed and have personal knowledge of the facts stated herein. I make this affidavit at the request of Milbank, Tweed, Hadley & McCloy, attorneys for New York Stock Exchange, Inc.

2. On May 24, 1973, legal proceedings were instituted in the United States District Court for the Southern District of New York by the Securities Investor Protection Corporation ("SIPC") against Weis Securities, Inc. ("Weis"), then a member organization of New York Stock Exchange, Inc. By order dated May 30, 1973, the court (Gurfein, J.) granted an application for an order adjudicating that the customers of Weis were in need of the protection afforded by the Securities Investor Protection Act of 1970 ("Protection Act") and appointing Edward S. Redington as Trustee for the liquidation of the business of Weis in accordance with the provisions of the Protection Act. Hughes Hubbard & Reed were appointed counsel for Mr. Redington.

3. On May 31, 1973, the Trustee's administrative staff commenced mailing customer claim forms to the customers of Weis,

together with a notice concerning the liquidation of that firm.

39a

In addition, within a matter of days of taking possession of the Weis premises, the accountants for the Trustee, Messrs. Coopers & Lybrand, were able to ascertain that customer records appeared to be in good shape and that we would be able to make use of the Weis computer programs. As a result, in most cases account statements could be prepared on or before June 15 and mailed to Weis customers indicating the status of their accounts as determined under the provisions of the Protection Act. Also, checks were sent out as early as June 7 where claims had been filed promptly.

4. To date, approximately 32,000 customer claims have been received and processed by the Trustee. Of these, approximately 26,750 had been processed and approved by August 13. Checks totalling \$41 million for free credit balances and net equity payments have been sent out. Securities of a value of approximately \$125 million have been mailed to customers. The claims of 99.5% of Weis' customers have been satisfied in full. Claims of most of the remaining customers will be satisfied, in whole or in part, by a distribution of specifically identifiable cash and participation in the single and separate fund of customer property.

5. As in any brokerage operation, there were shortages of securities that Weis acknowledged holding for customers as of May 24, 1973. Whether in a cash account or a margin account, all of the securities to which a customer may be entitled at any given moment are not in the broker's possession. Some may have been pledged with banks; other may be receivable from other brokers in the normal course of business ("fails to receive" and "stocks loaned"); and others may just be missing or unaccounted for for one reason or another. None of the securities shortages at Weis resulted from sales by the Trustee.

6. Under the provisions of the Protection Act, the 40a
Trustee was required to prorate the distribution of available securities constituting the specifically identifiable property of customers. Only full paid and excess margin securities constitute specifically identifiable property. In the case of accounts containing debit balances, all securities "held" in a customer's account were not specifically identifiable; in these accounts the Trustee credited the customer with cash in lieu of securities in the amount of 140 per cent of the debit balance pursuant to Rule 15c3-3 under the Securities Exchange Act of 1934. From this amount, the debit balance was subtracted as required by Section 6(c)(2)(A)(iv) of the Protection Act (as well as its predecessor, Section 60e of the Bankruptcy Act) and the remaining cash balance was credited to the customer.

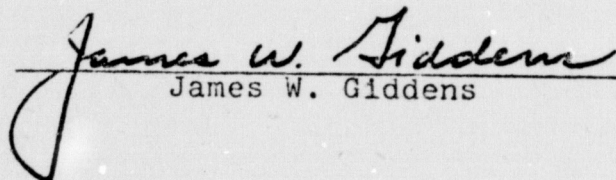
7. The Protection Act provides that customers will be credited with the market value as of the date of the commencement of the liquidation--in this case, May 24--of securities which cannot be returned to them as specifically identifiable property. Payment of cash in lieu of securities is made by SIPC cash advances up to a maximum of \$50,000 for each customer. Customers whose claims exceed the \$50,000 limit for SIPC advances are entitled to share in the single and separate fund of customer property and, to the extent their claims are not satisfied from that fund, the general estate of the debtor.

8. There is no procedure authorized in the Protection Act for the collection of debit balances from customers and, indeed, such a procedure would be impractical. The Trustee would have been required to attempt to collect more than \$40 million from brokers and customers in order to pay off bank loans and to redeem a substantial amount of the securities held by banks. SIPC funds are not available to redeem securities on loan to banks or to purchase securities on the open market to cover such

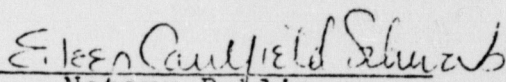
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deficiencies. Nor does the Act provide for the transfer of accounts from one brokerage firm to another. Instead, shortages of securities are credited to the customer account at their value on the date the liquidation proceeding is commenced.

9. After the liquidation proceeding of Weis commenced on May 24, these procedures required by the Protection Act had to be followed.


James W. Giddens

Sworn to before me this
23rd day of April, 1974.


Notary Public

EILEEN CAULFIELD SCHWARTZ
Notary Public, State of New York
No. 31-0066475
Qualified in New York County
Commission Expires March 30, 1975

42a

----- -x
:
NORMAN RICH, et al.,
:
Plaintiffs,
:
-against- 73 Civ. 4642 C.L.B.
:
NEW YORK STOCK EXCHANGE, et al.,
:
Defendants.
:
----- -x

The affidavits (Julien, Shurnin and Schiff) and the memorandum submitted in opposition to the Exchange's motion for summary judgment are strikingly silent on the question of the validity as a matter of law of the plaintiffs' theory of damage -- that plaintiffs were entitled to be "tippees." The validity of such a theory was rejected in Levine v. Seilon, Inc., 439 F.2d 328, 334-35 (2d Cir., 1971). (See Exchange moving memo., pp. 27-29) Instead of responding to Levine, however, plaintiffs attempt to avoid Levine by blurring the issue and amending by affidavit the second amended complaint to allege a theory that does not appear in the pleadings.* First, plaintiffs shift their claim

* It should be recalled that the second amended complaint was the result of the Court's order of December 7, 1973, granting the Exchange's motion for a more definite statement.

from profits that the plaintiffs might have made if the plaintiffs' accounts had been transferred out (Brooks moving Aff., Ex. A, ¶49) to "all the consequences and damages which accrued to the plaintiffs" from the SIPC liquidation that the privileged customers avoided by being transferred out. (Julien Aff., pp. 2-3) But plaintiffs shift from profits to consequences cannot eliminate the fact that plaintiffs would have avoided such "consequences" only if the plaintiffs had benefited from the same "unfair advantage based on inside information" (Julien Aff., p. 3) as the privileged customers about whom they complain.

Second, plaintiffs now introduce a totally new theory of liability by asserting that "Weis would never have been allowed to reach a point where its financial difficulties were such that a SIPC Trustee would have to be appointed" (Julien Aff., p. 2), if the Exchange had properly policed Weis pursuant to Section 6 of the Exchange Act. This theory is nowhere pleaded in the second amended complaint (Brooks moving Aff., Ex. A). Indeed, it is apparent that the second amended complaint speaks only of the Exchange's conduct in April and May, 1973. (¶30) No other times are mentioned. Moreover, each cause of action speaks in terms of breach of duty for the benefit of the "tippee" or privileged customers.

(¶¶ 31, 34, 37, 47)

44a

Plaintiffs' affidavits, phrased by their attorneys without the rigorous scrutiny of a deposition, are said to set forth "damages which are definite, certain and easily calculable". (Julien Aff., p. 4) Yet, in spite of this alleged ease of calculation, nowhere do the papers reflect the total amount of such "definite" damages or how they would be calculated. Indeed, upon close scrutiny it is apparent that these claims are more "might-have-beens", "would-have-beens" and "could-have-beens", but now in miniscule amounts compared to the extravagant estimates presented during plaintiffs' depositions.

The affidavit of Shurpin catalogs six supposed items of "damages which are easily ascertainable and readily provable" (Shurpin Aff., p. 5) and that were purportedly overlooked by the Exchange in its motion. (Julien Aff., p. 5) They include:

- (1) Loss of the use of \$3,000 from May 24 until July 1, 1973 when the SIPC check was received.
- (2) Interest on the value of the securities in the Weis account frozen during the SIPC liquidation.

- (3) Unspecified losses from liquidation of securities that Shurpin desired to retain.
- (4) Odd-lot commissions that Shurpin might have to pay in order to sell his securities.
- (5) Adverse tax consequences purportedly arising from the fact that Shurpin was forced to take a long term capital loss this year, which will cost him \$1,000 per year until his tax loss is offset by future possible capital gains.
- (6) Interest on dividends delayed in payment by the SIPC trustee. (Shurpin Aff., pp. 5-6)

The Plan makes similar claims for each item but (5), which relates to tax consequences that would not apply to the Plan. This reply memorandum does not discuss item (3) or (4), because each was thoroughly discussed at pages 25-27 of the Exchange's moving memorandum, and it is plain that the technique of having the plaintiffs merely state by affidavit that such items constitute damage cannot convert those items into a compensable loss. Such statements do not constitute "...facts as would be admissible in evidence. . ."

required by Rule 56(e), Federal Rules of Civil Procedure. Nor are plaintiffs "competent" to testify to such a proposition. (Id.)

Interest on SIPC cash settlement. In their depositions the plaintiffs testified about certain transactions they could have conducted at substantial profits if their accounts had not been frozen by the SIPC liquidation. Plaintiffs own testimony demonstrated that such transactions were possibilities based upon surmise and conjecture. "Damage" based upon interest that plaintiffs might have earned on their SIPC cash settlements between the May 24 valuation date and early July when the checks were received is simply another "could have been" or "if" transaction. It is equally possible that the plaintiffs would have put the cash into a stock that would decline, as Shurpin, who in 1973 carried forward about \$15,000 in long-term capital losses from prior years, had apparently done frequently before. (Shurpin Aff., Ex. A) It is particularly disingenuous for Shurpin to talk about recovering interest on his cash when he saved 9-1/2% interest on his total debit balance in his margin accounts of \$10,693 that he would otherwise have paid. (Shurpin Dep., p. 21; Exchange Exs. 50F, 53E) There is no evidence (see Rule 56(e)) in plaintiffs' depositions or in their affidavits as to what the plaintiffs would have done with their cash or securities, although there is a great deal

of speculation about what they might have done. Anyone, guided by hindsight and self-interest, can speculate about profits that could have been made, but a motion for summary judgment can only be defeated by admissible evidentiary facts, not possibilities. Rule 56(e). Thus, in Union Ins. Society of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965), the Court of Appeals held:

Affidavits in support of or in opposition to a motion for summary judgment must contain admissible evidentiary facts. Conclusory statements . . . do not comply with requirements of Fed. R. Civ. P. 56(e) and, therefore, may not be considered.

Accord, Perma Research & Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969).

Interest on frozen securities. This item of damage is simply frivolous and reflects the plaintiffs' scramble to find some "damage" no matter how far-fetched. Plaintiffs have admitted receiving all of their outstanding dividends on their securities. They have no right to any additional monies thereon. They are not entitled to a double recovery. Otherwise, interest on their frozen assets becomes some completely unwarranted stab at what profits the plaintiffs might conceivably have made if they had traded in their securities. The item bears no relationship to the facts.

Adverse tax consequences. Shurpin's tax analysis is extraordinary. (Shurpin Aff., p. 6) He has obviously realized a tax benefit from his tax losses resulting from the deductibility of those losses. He appears to be arguing, however, that if he ever realizes any "possible capital gains" (Julien Aff., p. 6) -- a possibility that is highly unlikely in view of his wife's adamant opposition to further speculation -- he might have a greater tax benefit by offsetting such capital gains against his losses than the tax benefit he realizes by offsetting his losses against ordinary income. And these are the damages that plaintiffs describe as "definite certain and easily calculable!" (Julien Aff., p. 4) From possible profitable transactions that the plaintiffs might have made, plaintiffs turn to possible beneficial tax savings that might have been realized based upon possible profitable transactions that might some day be made, the calculations on which would require a computer.

Delays in dividend payments. This item of "damage" is of the same order as the first -- interest on the SIPC cash settlement. Plaintiffs have offered no proof to establish that there were delays in payment of dividends or if there were how long the delays were. There is no evidence as to what plaintiffs would have done with the checks. Shurpin may have used the checks for living

expenses, never investing them. The Plan might have used its dividends for other securities transactions. It is anybody's guess. It is not, however, evidence of damage admissible for the purpose of defeating the Exchange's motion for summary judgment. Rule 56 (e).

Taken together the plaintiffs' claims of "definite" damages are but a further illusion of damage -- an attempt to equate "interest," on no damage, with damage as matter of law, where plaintiffs received full recovery of their principal amounts from SIPC. There is no authority for awarding such pre-judgment interest in such circumstances.

The plaintiffs elected to file their claims in the SIPC proceeding. They received and accepted the SIPC checks in full satisfaction of those claims and are now barred from obtaining further recovery against the Exchange or any other person. The right to recover interest is merely incidental to recovery on the underlying claim, which was extinguished upon acceptance of the SIPC checks. Stewart v. Barnes, 153 U.S. 456, 464 (1894) ("plaintiff has parted with his right of action by accepting the money which was withheld from him, and at the same time given up his right to sue for the incidental damages.") cf. Cook v. United States, 274 F.2d 689, 692 (2d Cir. 1968). It would seriously defeat the congressional purpose of the Protection Act if the delays

attributable to SIPC in processing customer claims could become the basis of a damage claim against the Exchange and others. For example, in this case judicial action was commenced by SIPC against Weis on May 24, but a SIPC trustee in liquidation was not appointed until May 30.

(Giddens Aff., ¶ 2) During those six days, as contemplated by Congress, further efforts were made by the responsible regulatory agencies to keep Weis in business. Unfortunately, those efforts were unsuccessful, but to ensure that no unfairness would result to customers based upon market fluctuations during those six days, the valuation date was established by law as May 24. Protection Act § 5, 15 U.S.C. § 78eee(b)(4). If it is determined that the plaintiffs are entitled to recover interest for such necessary delays, there will never be any attempts to take corrective steps short of liquidation. Moreover, it would be an extraordinary application of the law of damages to hold that the Exchange is liable for interest based upon mechanical delays in processing 35,000 customer claims by SIPC. Even if the Protection Act were amended to establish authority for SIPC to redeem unavailable securities, to accept cash payment for debit balances, and to transfer accounts, there would be certain delays experienced. To allow recovery of interest against the Exchange for these delays would be contrary to the congressional purpose as expressed in this remedial legislation.

Furthermore, most of the SIPC funds used to compensate plaintiffs and other Weis customers come from assessments against registered broker-dealers, (Protection Act § 4, 15 U.S.C. § 78ddd(c)), most of which are members of the Exchange. To further surcharge the Exchange, a not-for-profit corporation made up of those member firms, would be contrary to all principles of equity and fairness. See Board of Comm'rs v. United States, 308 U.S. 343, 352 (1939) ("The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.").

Finally, plaintiffs were entitled to no delivery of securities or cash from the Exchange until they made demand. The commencement of this lawsuit would be the earliest date that could be deemed a demand for such delivery. Accordingly, plaintiffs would be entitled to no interest prior to the date this action was commenced, see 9 Ency. N.Y. Law Damage § 143, p. 121 (1965) ("where a demand is necessary to place the debtor in default, interest by way of damage is not recoverable until demand is made."), and by that time they had obtained from the SIPC trustee all their cash and securities.

Conclusion

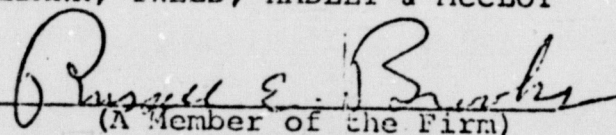
Plaintiffs' claims for damage contained in this second amended complaint are based upon a theory of liability that entitles them to no recovery. From "might-have-been" profits in the range of 200 to 300 per cent, the plaintiffs have scaled down their claims to the legal rate of interest. But whether the possible profit is 300% or 6%, it continues to be speculative and unprovable as a matter of law. There is no evidence to support plaintiffs' damage claims in any amount, and there is no authority for awarding interest prior to the date that this lawsuit was commenced. In short, there are no provable damages. The Exchange's motion for summary judgment should be granted.

May 20, 1974

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY

BY


(A Member of the Firm)

1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant
New York Stock Exchange, Inc.

Of Counsel

Russell E. Brooks
Richard C. Tufaro

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.....X

AFFIDAVIT

2. Defendant Exchange has submitted affidavits (together with, inter alia, the transcripts of plaintiffs' depositions and various documents) and a detailed memorandum in support of its motion for summary judgment and in opposition to plaintiffs' motion for class action status. Since those affidavits and that memorandum deal extensively with the reasons that require the denial of plaintiffs' class

action motion and the granting of summary judgment against plaintiffs, defendant Ladenburg is not submitting separate affidavits and a separate memorandum to restate again all those reasons. Instead, and in order not to burden the Court with duplicative papers, defendant Ladenburg

(a) joins in the motion of defendant Exchange for summary judgment, and moves that summary judgment also be granted in defendant Ladenburg's favor against plaintiffs, on the grounds and for the reasons stated in the affidavits and memorandum of defendant Exchange; and

(b) opposes plaintiffs' motion for class action status, on the grounds and for the reasons stated in the affidavits and memorandum of defendant Exchange.

3. With respect to plaintiffs' class action motion, defendant Ladenburg also desires to bring to the Court's attention certain additional matters which demonstrate that this action may not properly be treated as a class action, and therefore that plaintiffs' motion must be denied. Those matters are set forth below and in the accompanying memorandum of defendant Ladenburg.

4. With respect to the question of whether plaintiffs have been damaged by allegedly improper conduct -- viz., the alleged transfer of accounts from Weis Securities, Inc. ("Weis") to defendant Ladenburg -- it is important to note

that the Division of Market Regulation of the Securities and Exchange Commission has expressly considered that very transfer (on the complaint of plaintiff Shurpin) and found nothing improper or violative of the Federal securities acts in connection therewith. Thus, the Director of the Division of Market Regulation wrote to Mr. Shurpin's Congressman, by letter dated January 25, 1974, which was marked as Exchange Exhibit 48B to the Shurpin deposition and a copy of which is annexed hereto as Exhibit A, stating as follows:

"This is in response to your recent inquiries in which you enclose correspondence from your constituent, Mr. Charles Shurpin of Rockville Centre. Mr. Shurpin writes in regard to certain actions taken by the New York Stock Exchange ("NYSE") in regard to Weis Securities, Inc. ("Weis"), a broker-dealer in liquidation. . . .

"While it would not be appropriate for the Commission to comment specifically . . . on the litigation brought against the NYSE and others relating to Weis, it does appear to be correct that a number of customer accounts with debit balances were delivered by Weis to other broker-dealers with the concurrence of the NYSE.

"As you may know, under the Securities Exchange Act of 1934 and the Securities Investor Protection Act of 1970 ("SIPC Act") national securities exchanges and registered national securities associations are allotted certain self-regulatory responsibilities including responsibility for monitoring the financial condition of their members. It is an accepted practice when a broker-dealer is approaching financial difficulty for these self-regulatory organizations, including the NYSE, to undertake various measures in an effort to place the broker-dealer in a stronger financial posture and to thereby limit overall customer exposure. Such efforts frequently result in the merger, rehabilitation or, if necessary, self-liquidation of the broker-dealer without loss to customers

and without the delay and inconvenience which may attend a forced liquidation under the SIPC Act. One step often taken to improve a broker-dealer's financial posture is to reduce the firm's liabilities, and accordingly, reduce the amount of capital required to support these liabilities.

"As background it may be helpful to review, briefly, one of the principal financial responsibility rules of the Commission and the self-regulatory organizations, the net capital rule. This rule prescribes certain minimum capital standards which a broker-dealer must meet in order to operate. The rule also measures the financial soundness of a broker-dealer through what is called the net capital ratio. Basically, this is a ratio of a broker-dealer's liquid assets (net capital) to his aggregate indebtedness. The rules of the NYSE prescribe certain parameters which this ratio may not exceed if a broker-dealer is to continue in business as a member of the Exchange. These requirements are intended to make certain that broker-dealers will have a cushion of highly liquid assets to help assure their ability to meet obligations to customers and other broker-dealers.

"Broker-dealers commonly finance customers' margin indebtedness by hypothecating customers' margin securities with banks as collateral for loans. The amount of such borrowings are included in the computation of aggregate indebtedness of the broker-dealer and thereby increase his net capital ratio.

"One possible avenue for reducing a firm's net capital ratio is to reduce the amount of bank borrowings collateralized by customers' margin securities thus reducing aggregate indebtedness which in turn effects a lower net capital ratio.

"In order to reduce bank borrowings collateralized by customers' margin securities, customers' accounts with debit balances are delivered to other broker-dealers who are willing to assume responsibility for such accounts. These broker-dealers finance the customers'

debit balance and pay to the delivering broker-dealer the amount of the customers' indebtedness which the delivering broker-dealer uses to retire related bank borrowings.

"The NYSE advises us that they concurred in Weis' decision to deliver accounts in this manner. The Exchange's statement in this regard is enclosed. The Exchange states that they gave their approval 'to reduce the firm's liabilities and to ensure continued safety for all customers, not to afford favored treatment to any specific group.' The Commission is not aware of facts indicating a different motivation. At the same time, the Exchange advises us that they assisted Weis in merger negotiations with another member firm. Such efforts proved unsuccessful, however, and subsequently a decree was issued by the court initiating a liquidation under the SIPC Act.

"While these efforts to unwind the affairs of Weis without resort to a SIPC liquidation were unsuccessful, such efforts in other instances appear to have been successful in avoiding forced liquidations of broker-dealers and the disruption inherent in such liquidation proceedings" (emphasis added; footnotes omitted).

5. It is also to be emphasized that, as noted in the accompanying memorandum of defendant Ladenburg, plaintiffs have the burden of proving all the elements necessary to justify class action treatment. The perfunctory, four-page moving affidavit of one of plaintiffs' attorneys -- an affidavit which, in the few paragraphs (see pp.3-4) purporting to justify class action treatment, merely parrots the very general allegations of the second amended complaint -- is clearly insufficient to meet that burden, in the respects detailed in defendant Exchange's memorandum. In this connection, I note that Judge Wyatt of this Court

(Judge Wyatt being the Judge to whom the SIPC liquidation of Weis is assigned) has already expressly denied class action status in an action arising out of the liquidation of Weis, in a decision in Sarbonne v. Levine (73 Civ. 3018). A copy of that decision, which is dated March 26, 1974, is annexed hereto as Exhibit B.

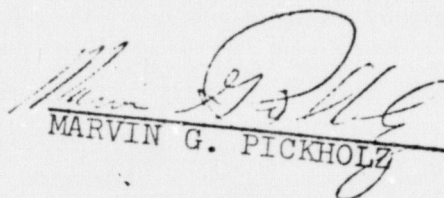
While the plaintiffs in Sarbonne v. Levine were investors in, rather than customers of, Weis, Judge Wyatt expressly recognized the universally applicable rule (whether the purported class is composed of customers, investors or others) that "the party seeking the establishment of a class action bears the burden of establishing those facts from which such a determination may be made" and denied the motion because, as on the present motion, "It has not been shown that the case at bar is properly to be maintained as a class action" (emphasis added) (p.6). Judge Wyatt found that

"Plaintiffs have failed to show any such scheme [aimed at the proposed class]; they have merely stated their conclusion that common questions of law and fact do exist. From the complaint and the affidavits for plaintiffs, it cannot be determined that there are questions of law and fact common to this proposed class",

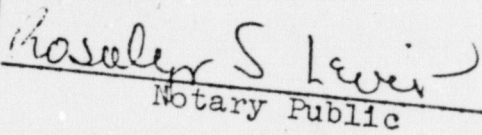
and

"There is also an inadequate foundation for a finding that the class is so numerous that joinder of all members is impracticable" (emphasis added) (p.5).

The teaching of such cases as Sarbonne v. Levine is that plaintiffs must sustain their burden of proof, and where -- as here -- they do not the class action motion must be denied.


MARVIN G. PICKHOLZ

Sworn to before me this
7th day of May, 1974.


Notary Public

ROSALYN S. LEVIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-2326793
Qualified in New York County
Term Expires March 30, 1975



EXHIBIT A - LETTER DATED JANUARY 25, 1974 FROM LEE A.
PICKARD TO JOHN W. WYDLER ANNEXED TO FOREGOING
SECURITIES AND EXCHANGE COMMISSION AFFIDAVIT
WASHINGTON, D.C. 20549

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DIVISION OF
MARKET REGULATION

JAN 28 1974

JAN 25 1974

Honorable John W. Wydler
House of Representatives
Washington, D. C. 20515

Dear Congressman Wydler:

This is in response to your recent inquiries in which you enclose correspondence from your constituent, Mr. Charles Shurpin of Rockville Centre. Mr. Shurpin writes in regard to certain actions taken by the New York Stock Exchange ("NYSE") in regard to Weis Securities, Inc. ("Weis"), a broker-dealer in liquidation. Mr. Shurpin refers particularly to events described in columns written by Mr. Robert Metz in the New York Times on October 27, and November 1, 1973.

While it would not be appropriate for the Commission to comment specifically on the editorial in the New York Times or on the litigation brought against the NYSE and others relating to Weis, it does appear to be correct that a number of customer accounts with debit balances were delivered by Weis to other broker-dealers with the concurrence of the NYSE.

As you may know, under the Securities Exchange Act of 1934 and the Securities Investor Protection Act of 1970 ("SIPC Act") national securities exchanges and registered national securities associations are allotted certain self-regulatory responsibilities including responsibility for monitoring the financial condition of their members. It is an accepted practice when a broker-dealer is approaching financial difficulty for these self-regulatory organizations, including the NYSE, to undertake various measures in an effort to place the broker-dealer in a stronger financial posture and to thereby limit overall customer exposure. Such efforts frequently result in the merger, rehabilitation or, if necessary, self-liquidation of the broker-dealer without loss to customers and without the delay and inconvenience which may attend a forced liquidation under the SIPC Act. One step often taken to improve a broker-dealer's financial

Exhibit A

Def. Exhibit 480/21

John W. Wydler

posture is to reduce the firm's liabilities, and accordingly, reduce the amount of capital required to support these liabilities.

As background it may be helpful to review, briefly, one of the principal financial responsibility rules of the Commission and the self-regulatory organizations, the net capital rule. This rule prescribes certain minimum capital standards which a broker-dealer must meet in order to operate. The rule also measures the financial soundness of a broker-dealer through what is called the net capital ratio. Basically, this is a ratio of a broker-dealer's liquid assets (net capital) to his aggregate indebtedness. The rules of the NYSE 1/ prescribe certain parameters which this ratio may not exceed if a broker-dealer is to continue in business as a member of the Exchange.2/ These requirements are intended to make certain that broker-dealers will have a cushion of highly liquid assets to help assure their ability to meet obligations to customers and other broker-dealers.

Broker-dealers commonly finance customers' margin indebtedness by hypothecating customers' margin securities with banks as collateral for loans.3/ The amount of such borrowings are included in the computation of aggregate indebtedness of the broker-dealer and thereby increase his net capital ratio.4/

One possible avenue for reducing a firm's net capital ratio is to reduce the amount of bank borrowings collateralized by customers' margin securities thus reducing aggregate indebtedness which in turn effects a lower net capital ratio.

1/

Firms which are members of the principal national securities exchanges are presently subject to the net capital rules of those exchanges. The Commission has proposed a uniform net capital rule which would apply to all broker-dealers regardless of exchange affiliation.

2/

The net capital rule of the NYSE is complemented by NYSE Rule 326 which, among other things, requires a broker-dealer, before he reaches the maximum parameters permitted under the net capital rule, to take certain steps to reduce his business to levels which will lessen the exposure to customers.

3/

Rules 8c-1 and 15c2-1 under the Securities Exchange Act of 1934 prescribe the conditions and terms under which this may be done.

4/

The net capital ratio is determined by dividing aggregate indebtedness by net capital. Thus, any increase in aggregate indebtedness which is not offset by additional net capital increases the broker-dealer's ratio.

Honorable John W. Wydler
Page Three

62a

In order to reduce bank borrowings collateralized by customers' margin securities, customers' accounts with debit balances are delivered to other broker-dealers who are willing to assume responsibility for such accounts. These broker-dealers finance the customers' debit balances and pay to the delivering broker-dealer the amount of the customers' indebtedness which the delivering broker-dealer uses to retire related bank borrowings.

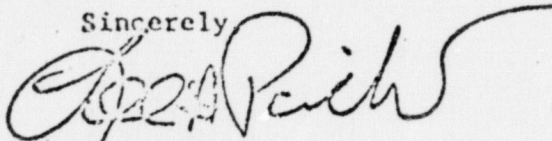
The NYSE advises us that they concurred in Weis' decision to deliver accounts in this manner. The Exchange's statement in this regard is enclosed. The Exchange states that they gave their approval "to reduce the firm's liabilities and to ensure continued safety for all customers, not to afford favored treatment to any specific group." The Commission is not aware of facts indicating a different motivation. At the same time, the Exchange advises us that they assisted Weis in merger negotiations with another member firm. Such efforts proved unsuccessful, however, and subsequently a decree was issued by the court initiating a liquidation under the SIPC Act.

While these efforts to unwind the affairs of Weis without resort to a SIPC liquidation were unsuccessful, such efforts in other instances appear to have been successful in avoiding forced liquidations of broker-dealers and the disruption inherent in such liquidation proceedings.

In regard to Mr. Sharpin's request for the return of his securities, the SIPC Act does not provide for such a procedure. I have enclosed a brief memorandum, prepared by this Division, which explains the principal steps involved in a SIPC liquidation. As discussed in that memorandum, under the provisions of the SIPC Act, customers are entitled to receive their "net equity" computed as of the filing date which in the case of Weis was May 24, 1973. Where the trustee does not have available sufficient shares to satisfy, in securities, the claims of customers who are entitled to securities, the customers are given cash in lieu of securities.

I hope this information will be helpful to you and will help to provide your constituent with a better understanding of these events.

Sincerely



Lee A. Pickard
Director

Enclosures

STUART EDWARD SARBONE and
HARRY P. BENEDEK, Plaintiffs,

-v-

ARTHUR LEVINE, et al.,
Defendants.

73 Civ. 3018

This is a motion by plaintiffs Sarbone and Benedek (1) for an order determining that the action be maintained as a class action (Fed. R. Civ. P. 23; Local Rule 11A) and (2) for "an Order permitting the plaintiffs to sue the defendant Weis Securities, Inc.".

The motion was heard by me on November 9, 1973 and decision was reserved.

1.

On May 24, 1973, the Securities and Exchange Commission (SEC) commenced an action in this Court (73 Civ. 2332) against Weis Securities, Inc. (Weis) and certain of its directors, officers and shareholders. There were a number of claims but primarily the action was based on the financial difficulties of Weis and an injunction was asked against violations of the net capital rule and other provisions for the protection of customers; a temporary receiver was sought. The action was in normal course ("by lot", IAS Rule 4(A)) assigned to me.

Under the Securities Investor Protection Act of 1970 (15 U.S.C. §§ 78aaa and following; "the 1970 Act"), the Securities Investor Protection Corporation (SIPC) may apply to the Court for a decree that customers of a member of SIPC "are in need of the protection" provided by the 1970 Act (15 U.S.C. § 78eee(a)(2)) and, with the consent of SEC, such an application may be "combined" with any action brought by SEC (15 U.S.C. § 78eee(a)(3)(A)). If such an application be granted, the Court must "forthwith" appoint a trustee "for the liquidation of the business" (15 U.S.C. § 78eee(b)(3)).

On May 24, 1973, after the action (73 Civ. 2332) had been commenced by SEC, SIPC filed an application under the 1970 Act.

On May 25, 1973, Judge Gurfein as the Part I Judge (IAS Rule 5) signed an order requiring Weis and the other defendants in 73 Civ. 2332 to show cause before him on May 30, 1973, why a preliminary injunction should not be granted and why a temporary receiver of Weis should not be appointed.

Exhibit "B"

On May 30, 1973, Judge Gurfein appointed Edward S. Redington as trustee "for the liquidation of the business" of Weis and enjoined all persons from "commencing any suit or action or proceeding of any kind against the defendant Weis Securities, Inc. . . . without first obtaining an order of this Court". This was done on the application of SIPC and under the 1970 Act.

Act

Liquidation by a trustee under the 1970/ is to be conducted as if it were under Chapter X of the Bankruptcy Act (11 U.S.C. §§ 501 and following). Such is the direction of the 1970 Act (15 U.S.C. § 78fff(c)(1)).

The liquidation of Weis has been thus proceeding and is under the supervision of Referee Babitt.

After the appointment of the trustee, the SEC action (73 Civ. 2332) had run its course for all practical purposes because its objectives had been fully accomplished.

2.

The case at bar was commenced on July 9, 1973. When the complaint was filed, the attorney for plaintiffs signed a designation form employed in the Clerk's office. On this form it was stated that the SEC action (73 Civ. 2332) assigned to me was a "pending related case". In consequence, the Clerk's office automatically assigned the action at bar to me. It is not clear whether or not the case at bar is related to the SEC action. For present purposes and until further notice, it will be assumed that they are "related".

3.

The complaint in the action at bar purports to state one claim for money damages on behalf of a class said to consist of all persons "who bought the common stock of Weis from July 7, 1972 to June 1, 1973" (complaint, para 3).

The complaint avers that on or about September 12, 1972 Sarbone and Benedek each purchased from Weis 1,000 voting shares and 1,000 non-voting shares of Weis for \$50,000 (the total cost to the two plaintiffs of the 4,000 shares was thus \$100,000); that plaintiffs relied upon two financial statements prepared by Touche Ross & Co. (Touche), namely, certified financial statements for the year ending May 26, 1972 and a brochure entitled "Weis, Voisin & Co., Inc. - Answers to Financial Questionnaire and Additional Information - May 26, 1972"; that the statements and brochure were completed on July 7, 1972; that the statements were filed with the SEC on July 11, 1972; that Touche was the independent accounting firm

for Weis; that the individual defendants were directors, officers and stockholders of Weis; that the financial statements of Weis were materially false and misleading as Weis and the individual defendants knew or should have known; that plaintiffs and each class member relied on the Weis financial statements before buying stock of Weis; and that Touche was "grossly negligent". Money damages are asked. A violation of Section 10(b) of the Securities Exchange Act of 1934 is charged (15 U.S.C. § 78j(b)). Jurisdiction is asserted (and apparently exists) under 15 U.S.C. § 78aa.

All of the defendants have answered except for the defendant Schultz; there are various cross claims.

4.

Plaintiffs ask for a determination that this action may be maintained as a class action in an effort to represent "all other persons who bought the common stock of Weis from July 7, 1972 to June 1, 1973" (complaint, para 3). Although the names and addresses of the class are not known, plaintiffs estimate that the class is comprised of approximately 45 to 50 persons. Defendants argue that the number is "far less than fifty (50)" (Levine affidavit, para 5). Presumably the members of the class are those who bought the stock of Weis from Weis, but this is not entirely clear from the complaint.

Plaintiffs allege (complaint, para 9) that defendants knew or should have known that persons investing in Weis would rely upon its financial reports; and that "[i]n fact plaintiffs and each class member necessarily relied on Weis financial reports and statements before they purchased the securities of Weis" (complaint, para 10). The defendants argue that it is impossible to determine on what the proposed class members relied when buying Weis shares because Weis was "a privately held company" (Feltman affidavit, p. 5). It is suggested that sales of Weis shares were handled on a personal basis between the Weis employees and the purchasers of Weis shares. Presumably, that Weis shares were "privately held" is meant to imply that they were not registered with the SEC and that use of a prospectus was not required.

5.

Plaintiffs seek a class action determination under Fed. R. Civ. P. 23(b)(3). In order to succeed under this subsection, it is necessary initially to satisfy the four threshold requirements of Fed. R. Civ. P. 23(a). The principal question here is whether plaintiffs have provided a sufficient factual foundation to satisfy the first two requirements of Rule 23(a), that the class is so numerous that joinder of all

members is impracticable and that there are questions of law or fact common to the class.

The complaint sets forth the common questions of fact as: "[t]o what extent did defendants make and report false and misleading financial statements; and should defendants have known that the financial reports were materially false and misleading" (complaint, para 4(g)). The complaint further states that the common question of law is: "[W]hat duty did defendants owe to plaintiff and to each member of the class" (complaint, para 4(h)).

6.

Plaintiffs argue that since there were only two financial statements of Weis available for the period ending May 26, 1972, the alleged class "necessarily relied on these two documents". The defendants, however, contend that Weis is not a "public corporation" and sales of its stock were "private transactions"; that oral representations were the basis for the sales taking place during the period July 7, 1972 through June 1, 1973 (defendant Touche brief, p.21). The defendants further contend that each purchaser of Weis stock during the relevant period presents a separate question of reliance since the purchasers are a heterogeneous group of investors, varying in their knowledge of securities and therefore likely to have relied upon differing items of information.

If all members of the proposed class relied solely upon the same financial statements and brochure, it is likely that common questions of fact and law would exist among the class (Fed. R. Civ. P. 23(a)(2)). Since these statements and brochure cover the same time period (ending May 26, 1972), it is theoretically possible that most of the financial representations are common to both the statements and the brochure, including the overstatement of earnings alleged by plaintiffs. In order to show the existence of common questions it is not necessary that there be identical statements but merely that there exist misrepresentations common to both. Green v. Wolf Corp., 406 F.2d 291, 299 (2d Cir. 1968). Nor is it necessary to show which report each individual member relied upon, since questions of reliance are usually deferred until after the class action determination has been made. Fisher v. Kletz, 41 F.R.D. 377, 382 (S.D.N.Y. 1966; Tyler, J.)

The problem here, however, is that purchasers may have relied upon oral statements, as the defendants contend. Since the same oral statements are unlikely to be made to each purchaser, it is generally considered that a class action based upon oral representations is not proper. Morris v. Burchard, 51 F.R.D.

530, 534 (S.D.N.Y. 1971; Pollack, J.); 6 Loss, Securities Regulation 3947 (2d ed. 1969 Supp.)

It might be that purchases of Weis by some or all the class members were based upon both oral and written statements. Such a combination might not be fatal to a finding of common questions under Rule 23(a)(2) if the statements are so interrelated and cumulative that they make out a "common course of conduct". Fischer v. Kletz, 41 F.R.D. at 381 (above cited). In order to establish such a common course of conduct, it would be necessary to show that the defendants engaged in a manipulative scheme aimed at the proposed class here. Plaintiffs have failed to show any such scheme; they have merely stated their conclusion that common questions of law and fact do exist. From the complaint and the affidavits for plaintiffs, it cannot be determined that there are questions of law and fact common to this proposed class.

7.

There is also an inadequate foundation for a finding that the class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). The complaint avers in paragraph 4(b) that "the class consists of 45 persons". Plaintiffs' brief (p. 3) states that "the class would include about fifty persons". Defendants, however, contend that the class is closer to 15 to 25 members (Feltman affidavit, p.4) or more generally: "far less than fifty (50) different persons". (Levine affidavit, para 5)

It is not necessary to state the exact size of the class initially in order to find that a class exists. Fidelis Corp. v. Litton Indus. Inc., 293 F.Supp. 164, 170 (S.D.N.Y. 1968; Bonsal, J.) Nor is there any magic number which supplies a dividing line between what is a class and what is not a class; the question of the practicability of joinder depends upon all the circumstances surrounding a case. Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). A variation of approximately 30 members might not be a fatal flaw in determining whether the class is so numerous that joinder is impracticable.

The specific difficulty with the proposed class here is that the size borders on the bare minimum necessary for finding joinder impracticable. While some courts have permitted classes with members as few as 35 (Fidelis Corp. v. Litton Industries, Inc., 293 F.Supp. at 170 (cited above)), others have denied class action standing where the class numbered 25 (Moscarella v. Stamm, 288 F.Supp. 453, 463 (E.D.N.Y. 1968)). With a potential class between 30 to 50 members, plaintiffs have not shown that the members are too numerous for joinder; indeed, plaintiffs have failed to show any of the circumstances pointing to the size of the class.

No effort has been made to show the geographic concentraion or distribution of the proposed class. In Demarco v. Edens, 390 F.2d at 845 (cited above), the geographic concentration of 16 "putative plaintiffs" weighed against the finding of a class. Similarly, there is no information here as to the size of individual claims (to evaluate whether they are too small to warrant individual actions) or as to the ease with which members could be identified.

The party seeking the establishment of a class action bears the burden of establishing those facts from which such a determination may be made. Local Rule 11A; 3B Moore's Federal Practice ¶ 23.02-2 p.23-156.

The Court is aware of the emphasis under Rule 23 on an early class action determination where possible. Fed. R. Civ. P. 23(c)(1); Frankel, Some Preliminary Observations Concerning Rule 23, 43 F.R.D. 39, 40 (1967). It has been stated, however, that the 1966 Amendments to Rule 23 were enacted to give the trial court more flexibility and discretion in dealing with the often troublesome problems involved in making class action determinations. Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968).

It has not been shown that the case at bar is properly to be maintained as a class action.

8.

The second part of the present motion asks for an order permitting plaintiffs to sue Weis. This point arises because of the May 30, 1973 order of Judge Gurfein in the SEC action which, among other things, enjoined all persons from commencing actions against Weis without first obtaining an order of the Court.

Plaintiffs argue that the injunction applies only to the proceedings then before Judge Gurfein, that those proceedings are finished, and that the injunction is no longer in effect. In the alternative, should the injunction be in effect, the plaintiffs request permission to sue Weis. They contend that the difficulties of having to sue Weis separately would be too burdensome. The defendants Hertzberg, Nager and Levick join in the motion of plaintiffs.

The remaining defendants, principally Weis (through its trustee Redington), argue that the injunction of Judge Gurfein is still in effect; and that if for some reason the injunction is no longer effective, they argue that plaintiffs' claims are not provable under the 1970 Act.

The Court concludes that the May 30, 1973 injunction is still in effect. The injunction was ordered pursuant to Section 5(b)(2) of the 1970 Act (15 U.S.C. § 78eee(b)(2)) which authorizes the court to issue such an injunction and to continue it upon the appointment of a trustee.

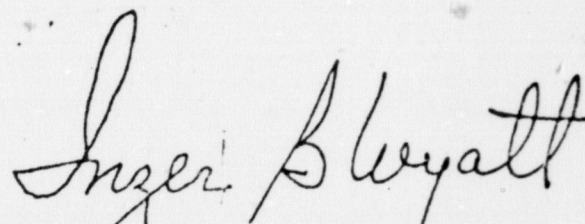
The 1970 Act contemplates a liquidation of the business of Weis as a bankruptcy matter. That liquidation is proceeding in this Court under the supervision of Referee Babitt. It may be that plaintiffs have claims provable in the liquidation; apparently defendants contend that they are not so provable. If they are not provable, it may be that the Referee supervising the liquidation will permit this action to proceed against Weis. In any event, this decision should be made, at least in the first instance, by Referee Babitt.

The motion for a class action determination is denied.

The motion for modification of the May 30, 1973 injunction to permit this action to proceed against Weis is denied without prejudice to such an application to Referee Babitt.

SO ORDERED.

Dated: 11/23/74


INZER B. WYATT
United States District Judge

MEMORANDUM OF DEFENDANT LADENBURG THALMANN
& CO., INC. (Filed May 8, 1974)

70a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NORMAN RICH, et al., :
 :
 : Plaintiffs, : 73 Civil 4642
 : (C.L.B.)
 : -against- :
 :
 : NEW YORK STOCK EXCHANGE, et al., :
 :
 : Defendants. :
-----X

MEMORANDUM OF DEFENDANT
LADENBURG THALMANN & CO. INC.

Plaintiffs move for an order, pursuant to Rule 23, F.R.Civ.P., and Rule 11A of this Court's Civil Rules, declaring this action to be a class action. Defendant New York Stock Exchange ("Exchange") also moves for summary judgment against plaintiffs on the ground that they have no provable damages.

Defendant Ladenburg Thalmann & Co. Inc. ("Ladenburg") submits this memorandum, together with the accompanying affidavit of Marvin G. Pickholz, (i) in opposition to plaintiffs' motion for class action status, and (ii) in support of defendant Exchange's motion for summary judgment.

1. Defendant Ladenburg Joins In The
Position of Defendant Exchange

Defendant Exchange has submitted affidavits (together with, inter alia, the transcripts of plaintiffs' depositions and various documents) and a detailed memorandum in support of its motion for summary judgment and in opposition to plaintiffs' motion for class action status. Since those affidavits and that memorandum deal extensively with the reasons that require the denial of plaintiffs' class action motion and the granting of summary judgment against plaintiffs, defendant Ladenburg is not submitting separate affidavits and a separate memorandum to restate again all those reasons. Instead, and in order not to burden the Court with duplicative papers, defendant Ladenburg

(a) joins in the motion of defendant Exchange for summary judgment, and moves that summary judgment also be granted in defendant Ladenburg's favor against plaintiffs, on the grounds and for the reasons stated in the affidavits and memorandum of defendant Exchange; and

(b) opposes plaintiffs' motion for class action status, on the grounds and for the reasons stated in the affidavits and memorandum of defendant Exchange.

With respect to plaintiffs' class action motion, defendant Ladenburg also desires to bring to the Court's attention certain additional matters which demonstrate that this action may not properly be treated as a class action, and therefore that plaintiffs' motion must be denied. Those matters are set forth below and in the accompanying affidavit of defendant Ladenburg.

2. Plaintiffs Have Failed To Sustain
Their Burden of Establishing Their
Right To Maintain A Class Action

Plaintiffs have the burden of establishing their right to maintain this action individually and as a class action and of demonstrating that each requirement of Rule 23 and Rule 11A has been satisfied. E.g., Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968) ("it is fundamental that those seeking to maintain an action as a class action must make a positive showing that it would be impracticable to

deny the prayer"); Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir. 1970) (plaintiff has "the positive burden of showing that the circumstances surrounding the case" justify class action treatment); Sarbonne v. Levine, 73 Civil 3018, March 26, 1973 (Pickholz Aff. ¶5, Exh. B) ("the party seeking the establishment of a class action bears the burden of establishing those facts from which such a determination may be made" p. 6); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 29 (S.D.N.Y. 1972) ("the machinery of the Rule with its attendant expense, should not be brought into play unless initially plaintiff, who has the burden of proof, justifies its application"); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968) ("the burden is on the plaintiffs to establish their right to maintain a class action"); 3B Moore's Federal Practice ¶23.02-2 at p. 23-156 ("The burden is on the party, who seeks to utilize the class action, to establish his right to do so").

Moreover, plaintiffs do not meet their burden by simply parroting the language of Rule 23. Instead, they are required to state factual allegations from which the Court can make an informed decision as to whether the standards of

Rule 23 have been met. As Professor Moore states in his treatise,

"An action, of course, is not maintainable as a class suit merely because it is designated as such in the pleadings; whether it is or not depends upon the attending facts. Both logic and justice dictate that a party or parties who seek to bring an action on behalf of a class . . . must bring themselves within the requirements of Rule 23. Hence the complaint . . . should allege the existence of the necessary facts showing that the prerequisites of subdivision (a) are satisfied, . . . and that the action falls within at least one of the three categories of class action enumerated in subdivision (b)" (emphasis added). 3B Moore's Federal Practice ¶23.02-2 at pp. 23-152 and 23-153.

The importance of requiring strict adherence to the burden imposed upon plaintiffs by Rule 23 and Rule 11A was emphasized by the Second Circuit in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), rehearing en banc denied, 479 F.2d 1020 (2d Cir.), cert. granted, 414 U.S. 908 (1973), which recognized the abuses that the class action device would otherwise permit. As Eisen points out, class actions "have sprouted and multiplied like the leaves of the green bay tree", and have severe "'in terrorem' effects" which amount to "legalized blackmail" in cases "where the merits of the class representatives claim is to say the least doubtful." 479 F.2d at 1018, 1019.

As defendant Exchange's memorandum points out, plaintiffs have failed to meet their burden of proof in various important respects. Their perfunctory four-page moving affidavit -- made by one of their attorneys -- devotes only a few paragraphs (pp. 3-4) to a purported justification for class action status, and even then simply parrots the conclusory, very general allegations of the second amended complaint. Thus, plaintiffs' present motion is like the motion made to Judge Wyatt (the Judge to whom the SIPC liquidation of Weis Securities, Inc. ("Weis") is assigned) in Sarbonne v. Levine, supra, another action arising out of the liquidation of Weis, where plaintiffs failed to sustain their burden of establishing the elements necessary to a class action and where Judge Wyatt therefore denied the class action motion. As Judge Wyatt stated,

"Plaintiffs have failed to show any such scheme [aimed at the proposed class]; they have merely stated their conclusion that common questions of law and fact do exist. From the complaint and the affidavits for plaintiffs, it cannot be determined that there are questions of law and fact common to this proposed class",

and

"There is also an inadequate foundation for a finding that the class is so numerous that joinder of all members is impracticable" (emphasis added) (Pickholz Aff. ¶5, Exh. B (p. 5))

The teaching of such cases as Sarbonne v. Levine is that plaintiffs must sustain their burden of proof, and where -- as here -- they do not the class action motion must be denied.*

CONCLUSION

For the foregoing reasons, and the reasons stated in the affidavits and memorandum of defendant Exchange, (1) plaintiffs' class action motion should be denied, and (11) summary judgment should be granted in favor of defendant Exchange and defendant Ladenburg and against plaintiffs.

Respectfully submitted,

ROSENMAN COLIN KAYE PETSCHKE
FREUND & EMIL
Attorneys for Defendant
Ladenburg Thalmann & Co. Inc.

* While plaintiffs in Sarbonne v. Levine were investors in, rather than customers of, Weis, the burden of proof rule there applied by Judge Wyatt is universally applicable, whether the purported class is composed of investors, customers or others.

LETTER DATED MAY 21, 1974 FROM RUSSELL E.
BROOKS TO CHARLES L. BRIEANT

77a

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA, NEW YORK 10005

COPY

May 21, 1974

Re: Rich v. New York Stock Exchange,
et al. 73 Civ. 4642 C.L.B.

Hon. Charles L. Brieant
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Brieant:

At today's oral argument of plaintiffs' class action motion and the motions for summary judgment by defendants New York Stock Exchange and Ladenberg, I undertook to provide the Court with a copy of two documents which I referred to during the course of the argument. I discharge that undertaking herewith.

First, I enclose a copy of Judge Lasker's decision in Independent Investor Protective League v. New York Stock Exchange, 73 Civ. 2823 M.E.L. (December 12, 1973), as reported in CCH Fed. Sec. Law Rep. ¶ 94,322. You will recall that I cited the Court to the Independent Investor decision in response to Mr. Julien's argument on behalf of plaintiffs that their claim on the merits was grounded on the Exchange's failure to publicize the financial problems of Weis Securities. The enclosed decision holds that such a claim is not maintainable as a matter of law.

Second, I enclose a copy of Exchange Rule 325 as it was in effect in April and May of 1973. Rule 325 is the Exchange's capital rule. Paragraph (a) of Rule 325 sets the

basic requirement and the many remaining pages of the rule provide the detailed instructions necessary to properly compute the ratio. I referred the Court to this rule during the course of oral argument for the proposition that while the rule sets a prescribed capital ratio for an Exchange member organization, it does not provide any specified penalty for violation of the rule. The first matter, of course, is correction of the violation. Then, violations of the capital rule, as other rules, are treated under general provisions of the Exchange's constitution and rules providing for disciplinary proceedings and, upon a finding of guilt, a broad spectrum of penalties ranging through such things as a warning, a fine, or suspension, depending upon the circumstances of each case.

In the interest of complete disclosure, I am also enclosing a copy of Exchange Rule 326, which requires a reduction of a member organization's business as it approaches a condition which might give rise to violation of the capital requirements of Rule 325. Such a reduction occurred in respect to Weis through the here challenged transfer of some of Weis' margin accounts to Ladenberg (see Rule 326(b).11).

I am sending a copy of this letter and the enclosures to all counsel who have appeared in this action.

Respectfully submitted,

Russell E. Brooks

REB:kat
Enclosures

cc: All Counsel
(with enclosures)

AFFIRMATION OF ALFRED S. JULIEN
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79a

-----x

NORMAN RICH, et al.,

Plaintiffs,

- against -

73 Civ. 4642
C.L.B.

NEW YORK STOCK EXCHANGE, et al.,

Defendants.

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

ALFRED S. JULIEN being duly sworn, deposes and says:

I am a member of the firm of Julien & Schlesinger, P.C., and am familiar with the pleadings and proceedings had in this action and am submitting this affidavit in opposition to the defendant, New York Stock Exchange's motion for summary judgment allegedly on the grounds that the plaintiffs have no provable damages.

This action arises out of the liquidation of Weis Securities, Inc. On May 24, 1973, a SIPC Trustee was appointed to administer the assets of Weis due to Weis' financial condition at that time. The plaintiffs herein are the Trustees of the West Side Profit Sharing Plan, (The Plan) who maintained a cash account with Weis on May 24, 1973 and Charles and Lillian Shurpin who maintained a margin account with Weis on that same date.

When the SIPC Trustee was appointed, all the assets in the possession of Weis were frozen, customers of Weis even those with fully paid up cash accounts, such as the Plan could not obtain their assets or trade in their accounts for a period of months. In addition, when the SIPC Trustee took over, certain securities were sold out for various accounts and the cash realized from those sales was not turned over to the customer until months later.

I wish to make it clear that the plaintiffs are not, as the New York Stock Exchange is claiming, attempting to use this Court to revise the SIPC Act or to object to the actions of the SIPC Trustee.

The position of the plaintiffs in this action is clearly spelled out in the complaint and is in short that had the New York Stock Exchange properly and adequately policed and supervised Weis, a member firm of the New York Stock Exchange, as the Stock Exchange had obligated itself to do, pursuant to Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78 f) then Weis would never have been allowed to reach a point where its financial difficulties were such that a SIPC Trustee would have to be appointed and the plaintiffs suffering various damages as will be set out below.

The plaintiffs in this action are also claiming that prior to a SIPC Trustee being appointed and at a time when the

the New York Stock Exchange was aware that Weis was in violation of the net capital rules and was in financial difficulty, they advised certain large accounts of Weis to remove their accounts prior to May 24, 1973 when a SIPC Trustee was appointed and that those accounts, therefore received an unfair advantage based on inside information, were able to remove their accounts from Weis to the defendant, Ladenburg Thalmann & Co., and thus were able to avoid all the consequences and damages which accrued to the plaintiffs and all the other customers of Weis which arose out of the SIPC liquidation.

The defendant, New York Stock Exchange has now made a motion for summary judgment claiming that there are no genuine issues of material fact, that the plaintiffs have no provable damages, and, therefore, this action should be dismissed.

The defendant, New York Stock Exchange has spent 5 days deposing the plaintiffs in this action. During those depositions, the Exchange asked how the plaintiffs felt they were damaged. One of the ways in which each of the named plaintiffs felt they were damaged was that they were unable to trade in their account for a period of months and thus lost the benefit of various profitable transactions which they felt they would have made.

The defendant, Stock Exchange, argues that that measure of damages is speculative and cannot be proven and that this action therefore should be dismissed.

The Stock Exchange has very carefully in its 51 page brief, in support of its motion, abstained from mentioning that all the plaintiffs, aside from claiming damages for those transactions which they claim they would have made, likewise have claimed certain other damages which are definite, certain and easily calculable.

Sheldon Schiff, one of the Trustees of the Plan, testified very clearly on page 244, et seq. of his deposition, the ways in which the Trustees felt they were damaged, stating on pages 244-245:

"Q How is it that you are able to state that the loss is an amount of four or five figures?

A At the time my mind was running into those kind of numbers.

Q What does it represent?

A Not being able to put our hands on \$100,000 that we owned.

Mr. Schiff likewise testified (P. 214 of Schiff Deposition) that although the SIPC Trustee had sold out certain securities for the Plan on May 24, 1973, and received cash in the amount of \$11,869.51, the West Side Plan did not receive that money from the SIPC Trustee until during the summer of 1973 and thus, for a few months was deprived of the use of that cash.

Mr. Schiff further testified that the West Side Plan (P. 222 of Schiff deposition) did not receive dividends it was entitled to until months after it was entitled to them and that some

dividends were not paid to the Plan until 1974. See also Rich deposition (P.45).

Mr. Schiff also testified to the fact that the Trustee by liquidating small amounts of their securities compelled the Plan to be left with odd lots of securities and Mr. Rich, another Trustee of the Plan, testified (P. 37) that to trade odd lot shares would cost the Plan larger commissions.

Mr. Shurpin, during his deposition, likewise testified that he had been damaged by receiving dividends six to seven months late from the SIPC Trustee. (page 20) Mr. Shurpin who had a margin account had his securities sold out for him by the Trustee to pay off a debit which he owed Weis on his margin account. (His account was not under margin at this time) The SIPC Trustee not only sold off enough to pay the debit, but on May 24th sold off additional shares of Mr. Shurpin's securities for a total of \$3,003.66 but Shurpin did not get his cash back until July of 1973.

In addition, Shurpin testified that his major holding which the SIPC Trustee sold off was a company, Great Western Financial which he had been holding for 15 years for investment purposes (P. 18, 48-49) and he had no desire to sell his holdings in Great Western Financial. Particularly, on May 24, 1973 when the price of Great Western was $16\frac{1}{2}$ and its all time low had been $15\frac{7}{8}$. Shurpin also makes it clear in his affidavit in opposition to this motion, that in order to buy

back the shares of Great Western Financial, he would have had to pay a higher price than he had been given for the forced sale on May 24, 1973, and that he would also have incurred brokerage commissions, and that he, therefore, could not be put into the same position he was in on May 24, 1973 before the SIPC Trustee was appointed without suffering substantial damages. Shurpin further testified that he is damaged by the tax consequences of being forced to take a long term capital loss this year, and that although he may carry this tax loss over to subsequent years, the tax loss will cost him to lose \$1,000.00 per year until the \$34,000.00 loss which he has suffered this year will be offset by future possible capital gains.

In light of the above and the very specific and provable damages which have been set forth in the accompanying affidavits of Sheldon Schiff, on behalf of the Plan, and by Charles Shurpin, it is incomprehensible to your deponent, how the New York Stock Exchange can claim that the plaintiffs have no provable damages.

In a memorandum dated June 1, 1973, by James J. Needham, the Chief Executive Officer of the New York Stock Exchange (annexed hereto as Exhibit "A") Mr. Needham states:

"Despite the very clear advantages of the SIPC legislation, the rigid legal procedures that the Act requires can work to the disadvantage of the investors whom the new law is designed to assist."

The defendant, New York Stock Exchange is thus very well aware that the SIPC liquidation can and does result in damages to customers of Weis.

Your deponent fails to understand the argument made by New York Stock Exchange (P. 26 of its memorandum) with regard to the plaintiff's claim concerning higher commissions which they will have to pay due to the SIPC Trustee leaving them with odd lots rather than round lots of securities.

The Stock Exchange apparently takes the position that since it considers the damages arising out of odd lot commissions to be de minimis, they are entitled to summary judgment even if the damages arising out of odd lot commissions can be proven by the plaintiff. If there is only one thing that the Eisen case has made clear in this Circuit, it is that the damages suffered by a plaintiff because he has been compelled to pay greater commission on an odd lot than he would have had to pay on a round lot, are sufficient to entitle him to bring a cause of action. It is not speculative to assert that the plaintiffs have not suffered any damages until they have actually sold an odd lot and paid additional commissions. The difference between round lot commissions and odd lot commissions can be readily calculated from a chart. It is a lot more speculative to state, as the New York Stock Exchange does, that from some mysterious source the plaintiff may receive additional securities to round out their odd lots and, therefore, by the time they sell their securities,

they will have a round lot.

86a

The defendant, New York Stock Exchange on this motion is basing its motion for summary judgment solely on the claim that the plaintiffs have no provable damages. It is not contesting the liability aspect of the case at this point. Therefore, if this Court finds that the plaintiffs have suffered any amount of damages which are provable at a trial of this action, then the defendant, Stock Exchange's motion for summary judgment must be denied.


The affidavits of Charles Shurpin and Sheldon Schiff in opposition to the defendant, Stock Exchange's motion for summary judgment set forth very clearly certain concrete and definite damages which they have suffered. In addition, the plaintiffs have suffered perhaps greater damages from the fact that their accounts were frozen and they could not undertake transactions which they intended to had their accounts not been frozen. Difficulty in the proving of damages does not, however, warrant summary judgment.

WHEREFORE, your deponent requests that the defendant, Stock Exchange's motion for summary judgment be denied.

Sworn to before me this

7th day of May, 1974.

DAVID JACOBSON
NOTARY PUBLIC, STATE OF NEW YORK
My Comm. Expires 12/31/75
Gordon H. H. H. H. H.
100 Wall Street, New York, N.Y. 10038


Alfred S. Julien

MEMO DATED JUNE 1, 1973 FROM JAMES J. NEEDHAM
TO MEMBERS AND ALLIED MEMBERS

87a

THE New York Stock
Exchange

June 1, 1973

TO: Members and Allied Members

SUBJECT: Board Meeting - May 24th

The newly elected Board held its first meeting Thursday, May 24th. Normally this meeting would have been concerned mainly with the usual organizational matters of a new Board. However, events dictated otherwise. For the long-range future of the Exchange, probably the most significant action was a vote of the Board authorizing discussions with representatives of the Pacific Stock Exchange, Inc. to explore the feasibility of an affiliation.

The objectives of such an affiliation would be to provide better markets in listed securities and to realize economies in operations which should ultimately benefit the investing public. The Boards of both Exchanges believe that any such affiliation would hasten the formation of a central market system, embodying active competition between markets.

The other major development that preoccupied our meeting was the situation at Weis Securities Inc. The progressively deteriorating capital position of the firm made it necessary for the Board on the afternoon of May 24th to suspend Weis as a member organization after finding that the firm was in such financial condition that it could not continue in business with safety to its creditors or the Exchange.

On Tuesday of this week, the Exchange's Surveillance Committee met again trying to find a solution to the problems of Weis Securities and to see if it might be possible to avoid a court liquidation under the procedures provided by the Securities Investor Protection Act of 1970.

Many avenues were explored but none appeared to assure all customers of Weis the degree of protection afforded under SIPC. Accordingly, the Board of Directors of the Exchange

James J. Needham
Chairman and
Executive Officer

at a special meeting in the late afternoon of May 29th accepted the recommendation of its Surveillance Committee that no indemnification could be provided by the Exchange in connection with the transfer of customer accounts to another member organization.

On May 30th Judge Gurfein in the Federal District Court for the Southern District of New York appointed a SIPC Trustee for Weis Securities.

Despite the very clear advantages of the SIPC legislation, the rigid legal procedures that the Act requires can work to the disadvantage of the investors whom the new law is designed to assist. Consequently, the Exchange now is studying possible improvements in the SIPC legislation which we may recommend to the Board and to Congress later this year.

At the May 24th meeting the new Board also discussed several other matters. The proposal to increase commissions, which was originally approved by the Board at its May 3rd meeting, was put into Constitutional language and the necessary amendments were formally laid on the table, which starts the process for an eventual membership vote on the required constitutional amendments. However, approval of the SEC will be sought before the matter is voted on by the membership. We are submitting a formal application to the SEC in support of the proposal and meanwhile are preparing for public hearings which have not as yet been scheduled.

The Board also discussed the policy concerning Managed Institutional Accounts, a matter that the Board will take up again at its scheduled meeting in Washington June 7th.

James J. Freedham

AFFIDAVIT OF CHARLES SHURPIN IN OPPOSITION
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89a

-----x
NORMAN RICH, et al.,

Plaintiffs,

- against -

73 Civ. 4642
C.L.B.

NEW YORK STOCK EXCHANGE, et al.,

Defendants.
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

CHARLES SHURPIN being duly sworn, deposes and says:

I am one of the plaintiffs in this action and am making this affidavit in opposition to the defendant, New York Stock Exchange's motion for summary judgment.

I was a customer of Weis Securities, Inc., maintaining both an individual account in my own name and a joint account in the name of myself and my wife, Lillian Shurpin. Both accounts were margin accounts.

On May 24, 1973, all trading by Weis customers was stopped and the Court ordered SIPC to take over and liquidate Weis Securities due to financial difficulties of Weis.

The New York Stock Exchange takes the position that because I eventually got back either stock certificates for the securities held in my account at Weis on May 24th, 1973, or received cash from the SIPC trustee for the equity in my account, valued as of May 24, 1973, that I have not been damaged and, therefore, cannot bring an action in this Court

What the Stock Exchange fails to state is that since my account was a margin account when the SIPC Trustee came in to liquidate Weis, he immediately valued all my securities as of May 24th, 1973, sold off my strongest securities in order to pay off the debit which I owed to Weis although my account was not below the required margin and in fact sold off securities in excess of the amount necessary to pay my debit to Weis so that I was left with a cash balance of \$3,003.66.

The SIPC Trustee was thus holding \$3,003.66 of my money from May 24, 1973 until approximately July 1st, 1973, the date the SIPC Trustee mailed a check to me for that amount. During this period of time I received no interest on my monies held by the SIPC Trustee.

In the interim between May 24, 1973 and July 30, 1973, (the date that I received back from the SIPC Trustee the 42 shares of Great Western Financial which he had not sold out of my account, out of the approximately 800 shares of Great Western Financial which I had in my account on May 24, 1973) the price of Great Western Financial, my principal holding, went up from 16½ to approximately 19½. In addition, had I wanted to repurchase those shares of Great Western Financial, I would have had to pay brokerage commissions to the broker for handling the transaction for me.

I had been holding Great Western Financial for approximately 15 years for investment purposes and had no desire to sell it. I was suddenly faced with a situation where my securities were sold out for me without my approval although I had offered to pay any debit which was owing on my margin account so that I could have my account transferred to another brokerage firm. In order for me to repurchase the securities which I had been holding for 15 years which I did not want to sell, I would now have to pay the brokerage commissions and a higher price for the very same securities which were sold out for me.

Similarly, for some reason known best to the SIPC Trustee, odd numbers of shares were sold from my holdings. (Although the Exchange claims that the Trustee did not sell off any shares, yet the Trustee at one point demanded that I sign over my shares in Seeburg Industries. See Exchange's Exhibit 49, p. 199 of my deposition.) Where I once had 100 shares, the Trustee had sold off one or two shares leaving me with an odd number of shares and not a round lot (units of 100), and you have to pay additional commissions and get less for your securities if you sell an odd lot rather than a round lot.

Further, dividends which were due to me for my stock were not received by me until 6 or 7 months later when they were finally forwarded to me by the SIPC Trustee. I received no interest on those funds for the period that I did not have the use of them.

Similarly by having my securities sold out for me at a time when I did not want them sold, I incurred tax consequences which are highly unfavorable. Annexed hereto is a copy of Schedule "D" of my 1973 income tax return showing that I have suffered a long term capital loss of \$34,345.22. Although this tax loss can be carried over from year to year, the way the tax laws are structured, I will be losing \$1,000.00 per year for each year that I carry this loss over.

I feel that the greatest damage occurred to me from the circumstances that I could not trade in my securities for a period of approximately two months during which my account and assets were frozen. The defendants in this case have taken my deposition over a two day period, on February 7, 1974 and again on April 12, 1974. During that deposition, I was asked what transactions I would have made had my assets been available to me, and I advised the defendants of what transactions I contemplated making. I realize that there is nothing in writing to substantiate the transactions that I contemplated making, but was prevented from making, and that, therefore, those damages are difficult to prove.

The fact, however, that there may be some damages which are difficult to prove should not prohibit me from recovering for those damages which are easily ascertainable and readily provable, to wit:

- a) The fact that I was deprived of the use of \$3,000.00 in cash from May 24, 1973 until approximately July 1, 1973 when the Trustee finally returned the credit balance of my account to me.
- b) That several thousand dollars in assets in the form of securities were frozen and I am entitled to receive interest on the value of those assets for the period of time for which they were frozen.
- c) That my securities, particularly Great Western Financial, which I had been holding for almost 15 years were sold despite my desire to retain these securities. That Great Western Financial was sold for a price of $16\frac{1}{4}$ almost the lowest that security has ever been in the 15 years I have held it. I think its all time low is $15\frac{7}{8}$. In addition, had I wanted to and been able to repurchase Great Western Financial, I would have had to pay a higher price and brokerage commissions in order to be put back into the same position I was in on May 24, 1973 before the SIPC liquidation.
- d) The SIPC Trustee by leaving me with odd lots of securities has put me in a position where I must

accept a lower price for and pay higher commissions in order to sell these securities.

- e) By selling my securities in a year in which I did not want to sell them, I have suffered adverse tax consequences and will continue to lose \$1,000.00 per year until such time as I have used up the \$34,345.22 which I have had as a long term capital loss for the year 1973.
- f) The SIPC Trustee forwarded the dividends to me, to which I was entitled, months after I should have received them and I am entitled to interest on those monies.

I have been greatly injured by the fact that the New York Stock Exchange failed to properly supervise and police the activities of one of its member firms, Weis Securities, Inc. I feel that had the stock exchange properly supervised Weis and become aware of any irregularities as they arose, it would not have been necessary to appoint a SIPC Trustee and I would not have incurred the specific losses which I have set out above as well as other losses which may be more difficult to prove arising out of the liquidation of Weis Securities, Inc. by the SIPC Trustee.

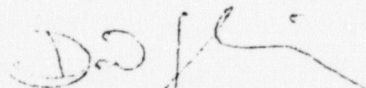
Although I am not satisfied by the way the SIPC Trustee handled my account, I wish to make it clear that this

action is not based on my quarrel with SIPC but rather upon the fact that had the New York Stock Exchange properly policed and supervised Weis, the situation would never have come about which would have necessitated the appointment of a SIPC Trustee.

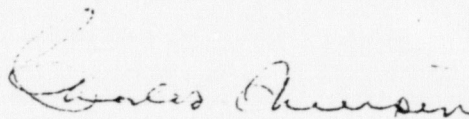
In light of the foregoing, which demonstrates that I have suffered certain concrete and easily calculable damages by reason of the Weis liquidation, the Exchange's motion for summary judgment on the ground that I have not suffered any provable damages should be denied.

Sworn to before me this

6th day of May, 1974.



DAVID JAROSLAWICZ
Notary Public, State of New York
No. 31-7075140
Qualified in New York County
Term Expires March 29, 1975



Charles Shurpin

SCHEDULE D
(Form 1040)Department of the Treasury
Internal Revenue ServiceAFFIDAVIT
Capital Gains and Losses

Attach to Form 1040. Examples of property to be reported on this Schedule are gains and losses on stocks, bonds, and similar investments, and gains (but not losses) on personal assets such as a home or jewelry.

Line(s) as shown on Form 1040

CHARLES - LILLIAN SHURPIN

Social Security Number
871 07 6723

Show only capital gains and losses—Assets Held Not More Than 6 Months

| a. Kind of property and description (Example, 100 shares of "ABC" Co.) | b. How acquired. Enter letter symbol (see instruction D) | c. Mo., day, yr. (Put date sold above dotted line and date acquired below dotted line) | d. Gross sales price | e. Cost or other basis, including fees and charges less expense of sale | f. Gain or loss |
|---|---|--|----------------------|--|-----------------|
| 100 Comm. with United Way | A | 4/22/79 | 0 | 1375.00 | 1375.00 |
| CLODGE INDUST. (originally Perfected) | A | 5/24/73 5/1/79 | 216.00 | 4,762.33 | 4,546.33 |
| SOS CONSOLIDATED | A | 5/24/73 6/1/79 | 1,519.25 | 3,800.00 | 2,280.75 |
| East Western Financial | A | 5/24/73 4/22/79 | 11,900.00 | 23,220.00 | 11,320.00 |
| (NONE) | | | | | |

| | | |
|------|--|------|
| 2 | Enter your share of net short-term gain or (loss) from partnerships and fiduciaries | 2 |
| 3 | Enter net gain or (loss), combine lines 1 and 2 | 3 |
| 4(a) | Short-term capital loss component carryover from years beginning before 1970 (see instruction H) | 4(a) |
| 4(b) | Short-term capital loss carryover attributable to years beginning after 1969 (see instruction H) | 4(b) |
| 5 | Net short-term gain or (loss), combine lines 3, 4(a) and 4(b) | 5 |

Part II Long-term Capital Gains and Losses—Assets Held More Than 6 Months

| | | | | | |
|------------------------------------|---|--------------------|-----------|-----------|-----------|
| 100 Comm. with United Way | A | 4/22/79 | 0 | 1375.00 | 1375.00 |
| CLODGE IND. (originally Perfected) | A | 5/24/73 5/1/79 | 216.00 | 4,762.33 | 4,546.33 |
| SOS CONSOLIDATED | A | 5/24/73 6/1/79 | 1,519.25 | 3,800.00 | 2,280.75 |
| East Western Financial | A | 5/24/73 4/22/79 | 11,900.00 | 23,220.00 | 11,320.00 |

| | | |
|-------|---|-------|
| 7 | Capital gain distributions | 7 |
| 8 | Enter gain, if applicable, from line 4(a)(1), Form 4797 (see instruction A) | 8 |
| 9 | Enter your share of net long-term gain or (loss) from partnerships and fiduciaries | 9 |
| 10 | Enter your share of net long-term gain from small business corporations (Subchapter S) | 10 |
| 11 | Net gain or (loss), combine lines 6 through 10 | 11 |
| 12(a) | Long-term capital loss component carryover from years beginning before 1970 (see instruction H) | 12(a) |
| 12(b) | Long-term capital loss carryover attributable to years beginning after 1969 (see instruction H) | 12(b) |
| 13 | Net long-term gain or (loss), combine lines 11, 12(a) and 12(b) | 13 |

Part III Summary of Parts I and II

| | | |
|-------|--|-------|
| 14 | Combine the amounts shown on lines 5 and 13, and enter the net gain or loss here | 14 |
| 15 | If line 14 shows a gain— | |
| (c) | Enter 50% of line 13 or 50% of line 14, whichever is smaller (see Part VI for computation of alternative tax). Enter zero if there is a loss or no entry on line 13 | 15(a) |
| (b) | Subtract line 15(a) from line 14. Enter here and on line 29, Form 1040 | 15(b) |
| 16 | If line 14 shows a loss— | |
| ➤ | Omit lines 16(a) and 16(b) and go to Part IV if losses are shown on BOTH lines 12(a) and 13. See instruction I. | |
| ➤ | Otherwise, | |
| (a) | Enter one of the following amounts: | |
| (i) | If amount on line 5 is zero or a net gain, enter 50% of amount on line 14; | |
| (ii) | If amount on line 13 is zero or a net gain, enter amount on line 14; or, | |
| (iii) | If amounts on line 5 and line 13 are net losses, enter amount on line 5 added to 50% of amount on line 13 | 16(a) |
| (b) | Enter here and enter as a (loss) on line 29, Form 1040, the smallest of: | |
| (i) | The amount on line 16(a); | |
| (ii) | 50% of (line 13) if married and filing a separate return. If a loss is shown on line 13, enter the loss, not the net loss; or, if a net gain is shown, enter the net gain; or, | |
| (iii) | The amount on line 16(a) if not married and filing a separate return. If a loss is shown on line 13, enter the loss, not the net loss; or, if a net gain is shown, enter the net gain. | 16(b) |

AFFIDAVIT OF SHELDON SCHIFF IN OPPOSITION

97a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
NORMAN RICH, et al.,

Plaintiffs,

- against -

73 Civ. 4642 C.L.B.

NEW YORK STOCK EXCHANGE, et al.,

Defendants.
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

SHELDON SCHIFF being duly sworn, deposes and says:

I am one of the Trustees of the West Side Corporation Profit Sharing Plan, one of the plaintiffs herein and am making this affidavit in opposition to defendant New York Stock Exchange's motion for summary judgment.

The West Side Corporation Profit Sharing Plan maintained an account with Weis Securities, Inc. on May 24, 1973 when all trading by Weis customers was halted, customers could not obtain their accounts and the court ordered SIPC to take over and liquidate Weis Securities due to financial difficulties by Weis.

The West Side Corporation Profit Sharing (Plan) maintained a cash account with Weis and all securities in its account were fully paid for. Annexed hereto as Exhibit "A" is a list and the valuation of the securities belonging to the Plan which were in the possession of Weis on May 24, 1973. (The valuation of Exhibit "A" is as of May 1, 1973, but there were no substantial changes)

The New York Stock Exchange takes the position that because eventually the Plan received either stock certificates or cash for those securities which they did not receive back from the SIPC that the Plan has not been damaged and, therefore, has no standing to proceed with this action.

The Stock Exchange ignores the fact that as of May 24, 1973, certain securities were sold out of the Plan and the Plan was credited with \$11,869.51 in cash and that similarly, the Plan had a cash credit balance of \$215.66. The Plan, however, did not receive the more than \$12,000 belonging to it for a period of approximately two months. The Plan also received no interest on the \$12,000.00. Similarly, the dividends which belonged to the Plan were not paid to the Plan when they were issued, and the Plan did not receive their dividends until months later, and, of course, no interest was paid to the Plan on the dividend monies it did not receive for a period of months.

The Trustee did not return the same amount of shares to the Plan that the Plan had in its account on May 24, 1973. Instead, for whatever reason, a small number of shares were sold off from many of the securities held by the Plan, for example, where the Plan owned 100 shares of El Paso Natural Gas, they received back 98 shares from the Trustee. Where the plan owned 300 shares of Union Electric, they received back 296 shares from the Trustee. When you sell an odd lot of securities (an odd lot being one other than in 100 denomination), the brokerage commissions for the sale are greater than when you sell a round lot.

To claim, as the Stock Exchange does that because the Plan had funds in a savings bank account (which was drawing interest) they could have repurchased whatever shares were sold out for it by the Trustee and, therefore, the Plan was not damaged financially, is almost nonsensical. What they are saying in essence is that while the Trustee was holding \$12,000.00 of the Plan's money, the Plan should advance \$12,000.00 in interest receiving funds and pay brokerage commissions to repurchase shares which was in its account on May 24, 1973, and which the Plan never desired to sell, in order to be put back into the same position it was in on May 24, 1973 and yet the Stock Exchange claims the Plan was not damaged.

In addition, the Plan was damaged by having \$100,000.00 of its assets frozen for a period varying from six weeks to close to six months. The securities were sent back to the Plan by the Trustee in dribs and drabs during a period of time extending from July through October, 1973. There can be no question that \$100,000.00 belonging to the Plan belongs only to the Plan and it is entitled to the use of that \$100,000.00 and if it is deprived of the use of its money, the Plan is entitled to receive the interest on the money which was unavailable to it.

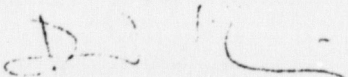
The Plan was most severely damaged by the fact that it could not trade in the securities in which it owned, particularly the Plan had intended to sell Guardian Industries which sold for \$21.00 a share on May 24, 1973. Instead the Plan could not dispose of Guardian Industries since its account was frozen by the Weis

liquidation, and by the time the Plan finally received back its stock certificates of Guardian Industries, Guardian was selling in the area of \$17.00. I realize that this is perhaps more difficult to prove than the other items of damage since it is difficult to show what you would have done with money had it been available to you. However, the fact that this item of damages is more difficult to prove than the other items set out above, does not mean that the Plan has not been damaged. It also does not mean that if the Plan is unable, for whatever reason, to prove one item of damage, it therefore has no right to proceed at a trial of this action to prove those items of damage which are readily ascertainable and easily calculated such as interest on the monies and assets of the Plan which the Plan was deprived of by reason of the Weis liquidation.

The Trustees are not attempting to use this Court as a forum to settle whatever quarrels they have with SIPC and the manner of the Weis liquidation by the SIPC Trustee. It is the Trustee's position that had the New York Stock Exchange properly supervised and policed the activities of Weis, the situation wherein a SIPC Trustee would become necessary would never have arisen and the losses incurred by the Plan would not have taken place.

Sworn to before me this

6th day of May, 1974.



DAVID J. DONAHUE
Notary Public, State of New York

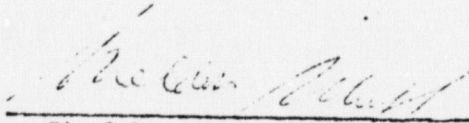

Sheldon Schiff

EXHIBIT A - PROFIT SHARING PLAN ANNEXED TO FOREGOING

101a

Weis Securities Inc.

AFFIDAVIT



MEMBERS NEW YORK STOCK EXCHANGE, INC.

49 WEST 33rd STREET, NEW YORK, NEW YORK 10001 • 212/565-0500

TRUSTEE OF WEST SIDE CORP.
PROFIT SHARING PLAN

| NO. OF SHARES | COST PER SHARE | TOTAL COST | STOCK | VALUE AS OF 5/1/73 |
|------------------|-------------------|-------------|--------------------------------|-----------------------|
| 300 | 36 7/8 | \$11,187.38 | Charter New York | \$ 9,187.50 |
| 100 | 17 7/8 | 1,812.33 | Central Main Power | 1,762.50 |
| 110 | 29 | 2,933.50 | Detroit Edison | 2,255.00 |
| 4 | | | Detroit Edison 5 1/2 CV PFD | 312.00 |
| 100 | 20 1/2 | 2,077.50 | El Paso Natl. Gas | 1,610.00 |
| 117 | 27 3/4 | 2,807.88 | Franklin Natl. Bank | 3,042.00 |
| 100 | 28 3/4 | 2,908.38 | Intl. Paper | 3,487.50 |
| 224 | 42 | 4,240.00 | Mfg. Hanover Trust | 7,056.00 |
| 2500 Bonds | 22 1/2 | 2,254.25 | Avco 7 1/2' 1993 | 2,081.25 |
| 100 | 30 1/2 | 3,059.13 | Marine Midland | 2,675.00 |
| 103 | 19 5/8 | 1,918.13 | Texas Gas Trans. \$1.50 CV PFD | 6,484.50 |
| 300 | 19 7/8 | 5,969.76 | Union Electric | 5,100.00 |
| 4500 Bonds | | | Wean United 5 1/2' 1993 | 2,036.25 |
| 500 | 34 1/2 | 17,446.25 | Natl. Cash Register | 16,137.50 |
| 300 | 15 3/4 | 12,682.50 | Uniroyal | 10,600.00 |
| 1000 | 22 3/4 | 23,103.95 | Guardian Industries | 22,625.00 |
| 300 | 35 3/8 | 10,748.01 | Libbey-Owen Ford | 10,537.50 |
| | | | Total | \$ 107,039.50 |
| | | | Credit | 168.86 |
| | | | Total Value | \$ 107,208.36 |

Dep't
ny stock

EXHIBIT

for Identification
2/7/73, HIGAS

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

102a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

NORMAN RICH, et al.,

73 Civ. 4642 (CLB)

Plaintiffs,

-against-

NEW YORK STOCK EXCHANGE, et al.,

Defendants.

-----x

PLAINTIFFS' MEMORANDUM OF
LAW IN OPPOSITION TO THE
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Introductory Statement

The plaintiffs are former customers of Weis Securities, Inc., who maintained accounts with Weis on May 24, 1973, at which time legal proceedings were instituted by SIPC, and, subsequently, a SIPC trustee was appointed to administer and liquidate the assets of Weis due to Weis' precarious financial condition. Following May 24, 1973, the assets of all of the customers of Weis

the plaintiffs,
were frozen, and all other persons similarly situated were unable
to obtain either the cash for their securities or their securities
for a period of several months and during this period of time were
unable to trade in their accounts.

The defendant, New York Stock Exchange, has brought
on this motion for summary judgment which does not contest the
liability or the acts of the defendant, New York Stock Exchange,
which the plaintiffs complain of, but takes the position that it
is entitled to summary judgment on the ground that there are no
genuine issues of material fact, that the plaintiffs have no prov-
able damages and that the New York Stock Exchange is entitled to
summary judgment.

The affidavits of Alfred S. Julien, Sheldon Schiff and
Charles Shurpin, submitted in opposition to the defendant Exchange's
motion for summary judgment, clearly set out several very specific
damages which were suffered by the plaintiffs which can readily and
easily be proven upon a trial of this action. In light of this, the
New York Stock Exchange's motion for summary judgment must be
denied.

Point I

104a

SUMMARY JUDGMENT SHOULD NOT
BE GRANTED WHERE THERE IS THE
SLIGHTEST DOUBT AS TO THE FACTS.

The New York Stock Exchange claims that the plaintiffs have no provable damages since the Exchange in its moving papers has seen fit to ignore all the items of damages enumerated by the plaintiffs and as set forth in their affidavits in opposition to the New York Stock Exchange's motion except the item of damage which the plaintiffs claim they suffered because they were unable to effectuate certain profitable transactions which they would have made had their accounts and assets not been frozen.

The New York Stock Exchange ignores the plaintiffs claim for damage for:

- a. interest on their money and assets which were denied to them for a period of several months;
- b. interest on dividends which were delayed for several months;
- c. additional expenses which will be incurred by the plaintiffs upon the sale of certain securities because they are odd lots rather than round lots.

d. adverse tax consequences.

All of the above damages being readily ascertainable, calculable and easily proven upon the trial of this action.

Where there is the slightest doubt as to the facts, summary judgment should not be granted. See Dean Construction Co. v. Simonetta Concrete Construction Corp., 37 F.R.D. 242 (S.D.N.Y., 1965). Judge Frank stated in Doehler Metal Furniture Co. v. United States, 149 F.2d 130:

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts...." (At 136)

In our case, although the plaintiffs admit that certain damages are imprecise because they are based upon what the plaintiffs would have done with their assets had they been available to them, other damages are set forth with great precision in the affidavits of Sheldon Schiff and Charles Shurpin which are being submitted in opposition to the Stock Exchange's motion for summary judgment and as to those damages it cannot be said that there are no genuine issues of material fact as to whether or not the plaintiffs have provable damages and since the plaintiffs have some, and as a matter of fact, very substantial provable damages, summary judgment must be denied.

In the case, Schutter Candy Co. v. Stein Bros. Paper Box Co., 338 F.2d 558 (7th Cir., 1964) cited by the defendant, Stock Exchange, in support of its motion (page 22 of Stock Exchange's brief), the Court was faced with the very same issue which is now present here. In that case, the plaintiff was able to prove certain damages in the amount of \$17,481.30. The plaintiff claimed an additional \$250,000 for loss of good will and damage to business reputation. The plaintiff in Schutter, however, was unable to prove the damages arising out of the loss of good will and damage to its business reputation. The Court in that case did not dismiss the plaintiff's claim or grant summary judgment as to the plaintiff's entire claim merely because the plaintiff was unable to prove some of the damages it sustained, rather the Court in Schutter awarded the plaintiff such damages as it was able to prove. The plaintiffs in this case are likewise entitled to have this Court decide at a trial which damages they have adequately proved and are entitled to recover from the defendants.

In a motion for summary judgment, the Court's duty is limited to determining whether factual issues exist and not in determining the issues themselves. See Slagle v. United States, 228 F.2d 673 (5th Cir., 1956).

The facts of this case indicate that there are substantial material issues of fact existing between the parties. The determination of factual issues should be made by the Judge or jury at a trial of this action and avoid what Judge Frank in Colby v. Klune, 178 F.2d 872 (2d Cir., 1949) labeled "a trial by affidavit."

The party moving for summary judgment has the burden of demonstrating that there is no genuine issue of fact between the parties. Fairbank, Morse & Co. v. Consolidated Fisheries Co. 190 F.2d 817 (3d Cir., 1951). As the Court stated in Insurance Co. of No. Amer. v. Bosworth Construction Co., 469 F.2d 1266 (5th Cir., 1972):

* * *

"... The burden is on the moving party to show that there is not the slightest doubt as to the facts and that only the legal conclusion remains to be resolved. Lighting Fixture & Elec. Sup. Co. v. Continental Ins. Co., 5 Cir. 1969, 420 F.2d 1211, 1213; United States v. Burket, 5 Cir. 1968, 402 F.2d 426; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F.2d 647. Even though the facts are undisputed, summary judgment is inappropriate if competing reasonable inferences may be drawn as to any material factual issues. Cole v. Chevron Chem. Co., 5 Cir. 1970, 427 F.2d 380; N.L.R.B. v. Smith Industries, Inc., 5 Cir. 1968, 403 F.2d 889. (At 1268)

The defendant, New York Stock Exchange, has not carried the burden in this case and its motion for summary judgment should be denied.

Conclusion

There are genuine issues of material fact between the parties as to whether or not the plaintiffs have suffered provable damages. The defendant, New York Stock Exchange, in its moving papers, ignored those damages of the plaintiffs which are easily provable at a trial of this action. Since there is a genuine issue as to the facts of what damages the plaintiffs have suffered which can be proved at a trial of this action, the defendant, New York Stock Exchange's motion for summary should be denied.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for the Plaintiffs

Alfred S. Julien,
Stuart A. Schlesinger,
David Jaroslawicz,

Of Counsel.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW
(Dated May 30, 1974)

109a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
NORMAN RICH, et al.,

Plaintiffs,

-against-

73 Civ. 4642
(C.L.B.)

NEW YORK STOCK EXCHANGE,
et al.,

Defendants.
-----x

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

The merits of this action are not presently on review. A motion for class action recognition does not examine nor go to the merits of the action. The defendants in their motion for summary judgment have rested exclusively on the ground that the plaintiffs have no provable damages. If their motion were based on the merits of this action and as to what certain defendants did nor did not do, there would obviously be a need for the plaintiffs to conduct additional discovery in order to properly respond to a summary judgment.

motion based upon the merits of this action. The defendants, however, have clearly stated that they are resting their instant motion for summary judgment on the sing's proposition that regardless of the merits of this action, plaintiffs have no provable damages.

Point I

THIS ACTION IS PROPERLY
IN THE FEDERAL COURT.

The plaintiffs' case principally deals with two specific sections of the Securities Exchange Act of 1934: Section 6 (15 U.S.C. 78f) pursuant to which the defendant, New York Stock Exchange, assumed the responsibilities and duties to supervise its member firms and Section 10 (15 U.S.C. 78j) and the rules promulgated thereunder by the Securities and Exchange Commission which prohibit any fraud in connection with purchases or sales in the securities market.

This case is thus readily distinguishable from the case of Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir., 1974) which was called to the Court's attention by counsel for Ladenburg Thalmann.

Point II

NON-TRADING 'TIPPERS' ARE
LIABLE UNDER 10b-5.

The defendant, New York Stock Exchange, cites Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir., 1971) for the proposition that the plaintiffs cannot claim that they too were entitled to be 'tippees'. That

is not the plaintiffs' claim in this case. The plaintiffs' thrust is not that the defendants should also have tipped them but that the defendants had a duty to either publicly disseminate the information which was in their possession to all persons similarly situated or to tell no one. The defendants cannot pick and choose and provide certain large accounts of Weis with privileged information so that they could transfer their accounts from Weis prior to Weis' liquidation. The Second Circuit recently in Shapiro v. Merrill Lynch, Pierce, Fenner & Smith (N.Y.L.J., April 9, 1974) reaffirmed its decision in SEC v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir., 1968) stating:

"Anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it . . . , must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed."

The Court in Shapiro, supra, also said:

"As we have stated time and again, the purpose behind section 10(b) and Rule 10b-5 is to protect the investing public and to secure fair dealing in the securities markets by promoting full disclosure of inside information so that an informed judgment can be made by all investors who trade in such markets (e.g., Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 793, 2d Cir., 1969, cert. denied 400 U.S. 822, 1970; SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848, 2d Cir., 1968, cert. denied sub nom. Kline v. SEC, 394 U.S. 976, 1969). We recently held in Radiation Dynamics, Inc., v. Goldmuntz (464 F.2d 876, 890, 2d Cir., 1972) that "(t)he essential purpose of Rule 10b-5 . . . is to prevent corporate insiders and their tippees from taking unfair advantage of the uninformed outsiders."

The Court in Shapiro, supra, further stated:

"Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. ..."

Indeed, when the merits of this case are at issue, Shapiro, supra, will well point the way. An untrading 'tipper' is equally liable under Rule 10b-5 as a 'tippee' who does trade. The Court in Shapiro stated:

"... in short, this case involves the liability of non-trading "tipplers" and trading "tippees" under section 10(b) and Rule 10b-5."

The forced sale of the plaintiffs' securities by the SIPC trustee makes the plaintiffs sellers under Rule 10b-5. See Vine v. Beneficial Finance, 374 F.2d 627 (2d Cir., 1967).

Counsel for both the defendant, New York Stock Exchange, and the defendant, Ladenburg Thalmann, raised the point that they had no duty to inform the customers of Weis of Weis' financial condition, and, to support that proposition, counsel for the Stock Exchange has supplied this Court with a copy of Judge Lasker's decision in Independent Investor Protective League v. New York Stock Exchange, 73 Civ. 2823 M.E.L. (December 12, 1973). The case is inapposite to the one at hand. What the plaintiffs contend is that the defendants 'tipped' certain privileged margin accounts of Weis so that they could remove their accounts from Weis to Ladenburg Thalmann. The defendants thus had a duty to either tell nobody of what they knew and were doing concerning Weis' financial condition or to

make it public. What they could not do was to tell only certain privileged large accounts of Weis without informing the plaintiffs and all other persons similarly situated.

Point III

THIS ACTION IS PROPERLY MAINTAINABLE
AS A CLASS ACTION.

The defendants in this action claim that this action should not proceed as a class action since individual questions as to damages predominate. This is not so. Common issues obviously predominate here on the issues of liability. Common issues are also dominant on the question of damages. As was pointed out during the oral argument of this motion on May 21, 1974, the denial of the use of the plaintiffs' money and/or access to their securities is common to every member of the class whom the plaintiffs seek to represent. Moreover, the amount in question is easily ascertainable from the records of the SIPC trustee by merely seeing how long a period of time each member of the class was deprived of the use of his monies and/or securities.

This point also goes to the defendants' motion for summary judgment on the grounds that the plaintiffs have no provable damages. In order to deny the defendants' motion for summary judgment, this Court need only find that the plaintiffs have one item of provable damages which has been demonstrated.

The additional damages suffered by the plaintiffs which may vary as to different members of the class need not prevent this action from proceeding as a class action so long as common issues predominate. As Judge MacMahon recently pointed out in Werfel v. Karmarsky, 61 F.R.D. 674 (S.D.N.Y., 1974):

"We agree with Judge Brieant and Judge Tenney that the common questions of law and fact, including the existence, character and materiality of the alleged misrepresentations made by defendants and their effect on the market price of REC warrants, predominates over the individual issues of damages and, possibly, causation. Siegel v. Realty Equities Corp of N.Y., supra, 54 F.R.D. at 427; Bergen v. Krararsky, supra, at 9; see, Korn v. Franchard Corp., supra, 456 F.2d at 1212-1213; Green v. Wolf Corp., supra, 406 F.2d at 301. Trial of individual issues, if necessary, can await the determination of common questions. Green v. Wolf Corp., supra, 406 F.2d at 301." (at 682)

See also Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y., 1969); Green v. Wolf, 406 F.2d 291 (2d Cir., 1968); Mersay v. First Republic, 43 F.R.D. 465 (S.D.N.Y., 1968); and In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281 (S.D.N.Y., 1971).

As Judge Bauman recently stated in Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160 (S.D.N.Y. 1973):

"... (T)he recent trend has been to allow class actions to proceed to a determination on the common questions and then to require individual proof on the remaining issues. See e.g., Green v. Wolf Corporation, supra, 406 F.2d at 301; Esplin v. Hirschi, supra; Donson Stores v. American Bakeries Company, 58 F.R.D. 485, 489-490 (S.D. N.Y. 1973); Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968). Finally, since this case involves a single pattern of misrepresentation it is peculiarly appro-

priate for class action treatment. See *Korn v. Franchard Corporation*, 456 F.2d 1206, (2nd Cir., 1972)." (at 165)

This approach is supported by the Federal Rules of Civil Procedure, in particular, Rule 23(c)(4)(A) which provides that an action may be maintained as a class action on a particular issue, with the Advisory Committee noting that in an action for fraud, a class suit could be maintained with respect to the issue of liability and then, if necessary, individual members of the class could be required to come forward and prove their damages individually. See 39 F.R.D. 69, 106 (1966).

Point IV

DEFENDANTS' CONTENTIONS.

The defendants' arguments miss the mark and the authorities cited are inapposite.

The defendants claim that there is no duty upon them to make the plaintiffs 'tippees', but this is not the plaintiffs' claim. Plaintiffs claim that if the defendants are in possession of any privileged information, they must either make a public disclosure or tell no one. They cannot advise certain large privileged accounts so that those accounts could be transferred from Weis prior to its liquidation. The defendant Stock Exchange claims they had no participation in this arrangement - the plaintiffs claim that the defendant Stock Exchange, at the very least, knew and acquiesced in what was transpiring and that by filing a registration statement with the SEC pursuant to Statute 15 U.S.C. 78f, they had undertaken

and were required to supervise the affairs of its member firms. The extent of and the participation of the Exchange's activities during this period must await the completion of discovery.

The good faith of a 'tipper' - as the Stock Exchange is claiming in this case to have acted in good faith stating: "We were trying to save Weis" - is no defense in 10b-5 action. In SEC v. Texas Gulf Sulphur Co., supra, the Court specifically considered that contention entitled Section D of its opinion "Is an insider's good faith a defense under 10b-5?" (401 F.2d at 854), and in its opinion the answer to the question it had posed was a very clear no. The defendants' defense of good faith does not aid its position. When the Securities Exchange Act of 1934 intended to make 'good faith' a defense, it specifically said so in the Statute. See e.g., 15 U.S.C. 78t.

It is also disingenuous for the Exchange (page 5) to claim that Shurpin actually saved money due to the SIPC liquidation since Shurpin was saving the 9 1/2 percent interest he was paying on the debit balance of his margin account. What the Exchange does not state is that as of May 24 the entire debit balance in the margin account was paid off by the SIPC trustee through the sale of Mr. Shurpin's securities and that from May 24 on there was no more debit balance. All that remained were monies belonging to Mr. Shurpin which he was deprived the use of for a substantial period of time.

The defendants urge that the plaintiffs be compelled to proceed individually and not as representatives of a class. However, neither the plaintiffs nor the Court could afford to have this action proceed in any way other than as a class action.

From the plaintiffs' position, if they proceed individually rather than as a class, any recovery which they might have would be absorbed by the expenses of this litigation. Plaintiffs' counsel likewise cannot afford to process these cases because of the immense time factor involved and with its fee limited to the named plaintiffs which they represent. Mr. Justice Powell stated in Eisen v. Carlile and Jacqueline, ___U.S.__(N.Y.L.J., page 1, May 30, 1974):

"A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only \$70. No competent attorney would undertake his complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."

It would be inadvisable for the customers of Weis to proceed individually since this would lead to multiplicity of actions and an unnecessary and unmanageable burden upon the Court. (We have at present had inquiries and requests from at least three other persons similarly situated as the plaintiffs requesting that they be joined as plaintiffs in this action, and we have had an inquiry from an attorney representing approximately 31 persons similarly situated who are holding back and not bringing individual actions before this class action motion is decided.)

The defendants likewise cannot benefit from multiple individual law suits. The only persons who may derive any benefits are their attorneys.

The defendants are attempting to put the plaintiffs in an untenable position. The defendants argue that if the plaintiffs have little or no means then they are improper representatives of the class since they would not be able to afford notice to the individual members of that class. See Eisen v. Carlile and Jacqueline, supra. On the other hand, the defendants claim that if the plaintiffs have means then they need not proceed as a class action but can afford to prosecute the action as individuals. The means may be present but individual litigation is too costly to be possible.

If we are to do away with class actions, it should be done by legislation and not by the gradual erosion by judicial fiat of the rights of those who must band together when they have been commonly injured.

The Exchange further contends in its reply memorandum in support of its motion for summary judgment (page 2) that the plaintiffs are inserting a new theory of liability into this case which does not appear in their complaint, to wit, that Weis would never have been allowed to reach a point where its financial difficulties were such that a SIPC trustee would have to be appointed if the Exchange had properly policed Weis pursuant to Section 6 of the 1934 Act. The

plaintiffs' second amended complaint specifically refers to Section 6 in paragraphs 25, 30, 40 and 44 and the plaintiffs' first cause of action (paragraph 27) specifically states that the plaintiff-trustees of West Side Corporation Profit Sharing Plan permitted their securities to remain in the possession of Weis solely because of reliance upon the fact that Weis was a member of the Exchange and its activities would be policed by the Exchange. The plaintiffs thus specifically relied upon the Exchange to police and enforce the net capital and liquidity requirements of its members so that the customers of Weis would have their interests protected.

The Exchange argues that the plaintiffs cannot complain of any damages they suffered due to the SIPC liquidation because "the plaintiffs elected to file their claims in the SIPC proceeding" (page 8, Exchange's reply memorandum). The plaintiffs did not elect to do anything. They were compelled to file a claim in the SIPC proceeding in order to salvage whatever of their monies could still be salvaged from Weis' liquidation. They surely had the duty to mitigate damages. The plaintiffs are also not seeking to hold the Exchange responsible for the actions of the SIPC trustee and are not, as the Exchange claims, attempting to thwart the Congressional purpose in its creation of SIPC. All that the plaintiffs are attempting to do is to hold the Exchange liable for failing to properly police and supervise Weis after it had agreed to do so pursuant to Section 6 of the 1934 Act, thus forcing the SIPC proceedings to eventuate.

In addition, the Exchange admits in its answer (paragraph 14) that the principals of Weis were engaged in false and fraudulent book-keeping since April, 1971. Had the Exchange properly supervised Weis as it had undertaken to do by filing a registration statement with the SEC pursuant to 15 U.S.C. 78f, then Weis' financial condition would never have deteriorated to the point where it would have to be liquidated. The Exchange admitted during the deposition of Bishop (pages 25-27) that it has the right to audit its member's affairs.

During the oral argument of this motion, the attorneys for the defendant Stock Exchange cited the case of Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y., 1971) apparently for the proposition that this action should not be maintained as a class action. In that very case, Judge Pollack did order an action to proceed as a class action as to those counts of the plaintiffs' complaint which were based upon a common course of conduct. Thus, the very case cited by the defendants require that this case be maintained as a class action.

The class action is also the only way in which the plaintiffs will be able to realize any monies if a recovery is had against the defendants since if they are forced to proceed individually rather than as a class, the expenses of the litigation would absorb any recovery had by the individual plaintiffs in this action.

Conclusion

For all of the foregoing reasons, an order should issue declaring that this action should be maintained as a class action and the defendants' motion for summary judgment on the grounds that the plaintiffs have no provable damages should be denied.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for the Plaintiffs

Alfred S. Julien,
Stuart A. Schlesinger,
David Jaroslawicz,

Of Counsel.

LETTER DATED MAY 22, 1974 FROM MARVIN G. PICKHOLZ TO
CHARLES L. BRIEANT

122a

ROSENMAN COLIN KAYE PETSCHKE FREUND & EMIL

575 MADISON AVENUE NEW YORK, N.Y. 10022

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MAX FREUND
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SEYMOUR D. LEWIS
LAWRENCE R. ENO
MURRAY COHEN
WILLIAM W. GOLUB
ANDREW J. SCHOEN
JACK E. BRONSTON
ASA D. SOKOLOV
GILBERT S. EULLSON
ARNOLD I. ROTH
GEORGE I. GORDON
LAWRENCE B. BUTTENWIESER
EUGENE L. VOGEL
GERALD WALPIN
MALL L. BARASCH
H. PAUL BURAK
EDWARD H. COHEN
FLORA SCHNALL
PETER F. NADEL
LEE H. ROBINSON
FRANK R. ROSINY

SAMUEL I. ROSENMAN
1898-1973

MURRAY HILL 8-7800
AREA CODE 212

CABLE ADDRESS
"ROCKAY NEWYORK"

TELEX: 12-8748

May 22, 1974

Honorable Charles L. Brieant, Jr.
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Rich v. New York Stock Exchange,
et al., 73 Civil 4642

Dear Judge Brieant:

During yesterday's oral argument of plaintiffs' class action motion and the cross-motion of defendants New York Stock Exchange and Ladenburg Thalmann & Co. Inc. for summary judgment, I responded affirmatively to an inquiry as to whether plaintiffs' claims were matters more properly for the state courts to determine, and referred to a recent decision of the Second Circuit, speaking through Judge Friendly, which indicated a growing displeasure with litigants who engraft upon a misplaced federal securities law claim a state law claim in order to avail themselves of the federal forum. That case, as I stated, is Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); a copy of the Kavit decision is enclosed herewith.

The question was also raised as to whether I believed plaintiffs purchased or sold any securities in "reliance" upon Ladenburg Thalmann. I expressed an opinion that they did not. The deposition transcripts filed with the Court establish that none of the plaintiffs "relied" upon Ladenburg Thalmann in connection with any securities transactions which they may ever have had or in their maintenance of accounts at Weis Securities, Inc. In fact, it is clear that plaintiffs had little or no knowledge of Ladenburg Thalmann, no relationship with that firm, and no conversations with any of its employees or representatives (Rich Dep. pp. 68-69; Shurpin Dep. pp. 90, 97, 112, 236-237).

Honorable Charles L. Brieant

2.

I am sending a copy of this letter and the enclosure to all counsel who have appeared in this action.

Respectfully submitted,


Marvin G. Pickholz

MGP:vr
Enclosures

cc: All Counsel
... (with enclosure)

LETTER BY RICHARD C. TUFARO TO THE HON. CHARLES
J. BRIEANT DATED APRIL 24, 1974

124a

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA, NEW YORK 10005

COPY

April 24, 1974

Re: Rich v. New York Stock Exchange
73 Civ. 4642

Honorable Charles L. Brieant
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Judge Brieant:

In connection with a motion for summary judgment dated April 23, 1974 by the defendant New York Stock Exchange, Inc. (the "Exchange") in the above-captioned matter, we have previously delivered to you the entire transcripts of deposition of Charles Shurpin, Sheldon Schiff, Norman Rich and Robert Bishop. Portions of these deposition transcripts are relied upon by the Exchange in its motion for summary judgment and in opposition to plaintiffs' motion for class action certification.

Although the deposition transcripts have not been reviewed or signed by the witnesses, we would expect that corrections would be brought to the Court's attention by the plaintiffs' attorneys.

Very truly yours,

Richard C. Tufaro

cc: To all counsel

25/4

MEMORANDUM DECISION (Filed July 23, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORIGINAL
JUL 23 1974
S. D. OF N. Y.

NORMAN RICE, et al.,

Plaintiffs,

-against-

73 Civ. 4642-CLB

NEW YORK STOCK EXCHANGE, et al.,

Defendants.

MEMORANDUM

Bricant, J.

Early in the year 1973, Weis Securities, Inc. (hereinafter "Weis"), a member firm of the New York Stock Exchange, (hereinafter the "Exchange" or "NYSE") was engulfed by financial difficulties. On May 24, 1973, when its condition appeared to be beyond salvation, the Securities Investors Protection Corporation ("SIPC") petitioned this Court, pursuant to the provisions of the Securities Investor Protection Act of 1970 for liquidation of Weis, and the appointment of a SIPC trustee. 15 U.S.C. §§78aaa, et seq. The trustee was appointed on May 30, 1973 and proceeded immediately thereafter to resolve customer claims.

Plaintiffs were among 35,000 customers of Weis who, until

JUL 23 1974
MKC:fi/14

May 24, 1973, were unaware and uninformed of Weis' impending demise. Institution of SIPC proceedings then deprived plaintiffs of access to or physical possession of their securities in Weis' possession, and the use of the capital these securities represented. This deprivation continued in most cases for at least several weeks, while the SIPC trustee performed his duties. Some customers, as is usual in such matters, never received all their securities in kind, although paid in cash to the limits of the protection provided under the SIPC provisions.

By this purported class action pursuant to Rule 23, F.R.Civ.P., plaintiffs seek damages for themselves and those similarly situated, from the Exchange, former officers and directors of Weis, and Ladenburg, Thalmann & Co. (hereinafter "Ladenburg"), a member NYSE firm.

Plaintiffs' second amended complaint alleges five causes of action, but upon analysis and consideration of the affidavits and memoranda submitted in their behalf, it appears that plaintiffs' claims are based on two theories only.

First, plaintiffs assert that the Exchange failed to discharge its duty imposed by section 6(b) of the Securities

Exchange Act of 1934, 15 U.S.C. §78f, to supervise and discipline Weis. This failure allegedly was the proximate cause of the SIPC liquidation, as a result of which they were damaged.^{1/} Second, plaintiffs assert that just prior to the liquidation, Weis, with the aid and acquiescence of the other defendants, transferred certain of its large and "privileged" margin accounts ("tippees") to other members of the Exchange, including defendant Ladenburg.

This action allegedly was also in violation of section 6(b) and section 10 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f, 78j and Rule 10b-5 promulgated by the Securities and Exchange Commission (hereinafter "SEC").

In April 1973 several principals of Weis informed the Exchange that, for an unspecified period, the firm "may have" been "understating its profit and loss report to the Exchange by several million dollars." (Bishop deposition, p.25). Defendants disclaim any prior actual knowledge by the Exchange that Weis faced financial difficulties. Plaintiffs come forward with no evidence to the contrary.

The Exchange immediately launched an intensive effort

to study Weis' problems, and aid in improving its capital position, so that the firm would survive and customer safety would be assured. As a result of those efforts, a merger of Weis with Ladenburg was suggested. Weis accepted this suggestion and, in turn, proposed to the Exchange that, pending negotiations and consummation of the merger, it transfer some of its larger margin accounts to Ladenburg in order to effect an automatic and immediate improvement of its debt-capital ratio. This suggestion was approved by the Exchange, as a time tested technique of "restoring stability to financially troubled firms." (Defendants' brief, p.9). According to the Exchange, Weis then unilaterally selected and transferred to Ladenburg those accounts with the largest debit balances. (Defendants' brief, p.9).

Defendants oppose plaintiffs' motion for class action determination, and have moved for summary judgment pursuant to Rule 56, F.R.Civ.P. Defendants summary judgment motion is based on the contention that plaintiffs have no provable damages. We need not reach this point.. Obviously speculative, remote or conjectural damages cannot be recovered in an action under the securities laws. However, arguably, on the facts of this case,

plaintiffs' right to immediate possession of certificates for their shares of stock, and their right to draw out their cash on demand were impaired by the unavoidable delay consequent on the activities of SIPC. If defendants by their tortious conduct produced this result, and if the damage was foreseeable, as it would be, it would seem plaintiffs could recover the traditional measure of damages for the wrongful distraint of a chattel, Chattanooga Discount Corp. v. West, 219 F.Supp. 140 (D.C. Ala. 1963), or the wrongful failure to pay money when due. But we need not reach this issue because, upon uncontested facts and evidence presented in the affidavits on this motion and the depositions, no cause of action exists in plaintiffs' favor.

Plaintiffs' first theory is based on defendant NYSE's alleged violations of section 6(b) of the Securities Exchange Act of 1934. Section 6(b), which provides for the registration of National Securities Exchanges with the SEC:

"No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding

inconsistent with just and equitable principles of trade."

Section 6(b) further provides that one purpose of the rules and regulations enacted by the Exchanges is "to insure fair dealing and to protect investors." In addition, section 15A(b)(8) of the 1934 Act, 15 U.S.C. §78o-3(b)(8) specifies that a national securities association may not register under the 1934 Act unless:

"... the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade ... and, in general to protect investors and the public interest"

Specifically, plaintiffs have argued that the Exchange failed to enforce Rule 325, its net capital rule, adopted in compliance with the aforementioned statutes. This Rule provides that the ratio of a member firm's aggregate indebtedness to its net capital may be no lower than 15 to 1. CCH, NYSE Guide, Vol. II, Rule 325.

A private right of action against the Exchange for failure to fulfill its statutory obligations may be founded on section 6(b). Baird v. Franklin, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944).

In Baird, plaintiff alleged that the defendant New York Stock Exchange firm converted its securities and that it suffered damages as a result of the Exchange's failure to take disciplinary action against the member firm. Holding that there is "no substantive resemblance between the duties of bailees or other fiduciaries and those of the Stock Exchange," the Second Circuit concluded that the Exchange was under a statutory duty, giving rise to a private claim for damages arising from its breach, "to investigate the dealings and the financial conditions of the members and to suspend or expel members who it had reason to believe had been guilty of conduct inconsistent with just and equitable principles of trade." 141 F.2d at p.239.

The duty of the Exchange under section 6 to enforce compliance with its rules "so far as within its powers" must be evaluated reasonably. The Exchange has 579 member organizations, which employ approximately 56,000 registered representatives. Marbury Management, Inc. v. Kohn, 373 F.Supp. 140 (S.D.N.Y. 1974); Butterman v. Walston & Co., 387 F.2d 822 (7th Cir. 1967), cert. denied 391 U.S. 913 (1968). The Exchange's supervision need not be "fluoroscopic," and liability should not be imposed on the

Exchange merely because a violation of its rules escaped its detection. Hochfelder v. Midwest Stock Exchange, 350 F.Supp. 1122, 1125 (S.D. Ill. 1972). Liability should attach only if plaintiff demonstrates that the Exchange had reason to believe or suspect that a member firm was in violation of the rules, and then failed or refused to take remedial action, which failure to act resulted in an injury to the plaintiff. Steinberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., CCH Fed. Sec. L. Rep. ¶194,599 (S.D.N.Y. June 14, 1974); Marbury Management, Inc. v. Kohn, supra; Baird v. Franklin, supra. No sheriff can prevent all felonies in his bailiwick, and the law does not so require.

It was held in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 182 (2d Cir.), cert. denied 385 U.S. 817 (1966), that the question of

"whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member cannot be determined on [an] all-or-nothing basis ... rather the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation."

Since the Court in Colonial declined to adopt a per se rule with

regard to the violation of Exchange rules, our research has revealed no decision which has upheld a complaint based on such a claim unless the complaint also contained sufficient allegations of fraud. See Starkman v. Seroussi, CCH Fed.Sec.L.Rep. ¶94,600 (S.D.N.Y. June 19, 1974); Schonheltz v. American Stock Exchange, CCH Fed.Sec.L.Rep. ¶94,539 (S.D.N.Y. May 6, 1974).

For purposes of this decision only, we shall assume that a private cause of action may in the circumstances of this case be founded on section 6, arising out of a negligent or wilfull failure to enforce Rule 325. However, measured against the standards established by the recent cases, plaintiffs' evidence fails to support a claim against the Exchange or Ladenburg based either on section 6 or Rule 10b-5.

From the affidavits and briefs submitted in support of defendants' motion for summary judgment it appears that the Exchange had no notice, and, through the exercise of reasonable diligence, did not and could not have learned prior to mid-April 1973 that Weis was in violation of the Exchange's capital requirements. (See deposition of Mr. Robert Bishop, pp. 11 and 24. Mr. Bishop, Senior Vice President of the Exchange, testified that in

1973 he was in charge of a staff of over 300 people who were responsible for enforcing compliance with Rule 325).

Plaintiffs have not alleged that the Exchange had actual knowledge of Weis' financial difficulties prior to mid-April 1973, nor do they allege any facts upon which we could find that the Exchange in the exercise of due diligence should have known prior to that time. In fact, careful examination of the second amended complaint reveals that plaintiffs base their claims only on defendants' actions after actual discovery of Weis' difficulties.

From the time the Exchange received notice of Weis' difficulties it acted with dispatch to discharge its statutory duties. The Exchange first conducted an intensive investigation and then approved a plan which called for a merger with Ladenburg, a stronger firm, preceded pendente by a transfer of some accounts from Weis to Ladenburg.^{3/} The Exchange did not select the accounts to be transferred. Its procedure was in accordance with practices the SEC has acknowledged to be a proper and effective means of salvaging firms facing financial ruin. Had it been successful, no customers of Weis would have been damaged or inconvenienced in any way.

The Director of the SEC's Division of Market Regulation wrote to the Hon. J. W. Wydler, Member of Congress, under date of January 25, 1974:

"It is an accepted practice when a broker-dealer is approaching financial difficulty for ... self-regulatory organizations, including the NYSE, to undertake various measures in an effort to place the broker-dealer in a stronger financial posture and to thereby limit overall customer exposure. Such efforts frequently result in the merger, rehabilitation or, if necessary, self-liquidation of the broker-dealer without loss to customers and without the delay and inconvenience which may attend a forced liquidation under the SIPC Act. One step often taken to improve a broker-dealer's financial posture is to reduce the firm's liabilities, and accordingly, reduce the amount of capital required to support these liabilities.

* * *

One possible avenue for reducing a firm's net capital ratio is to reduce the amount of bank borrowings collateralized by customers' margin securities thus reducing aggregate indebtedness which in turn effects a lower net capital ratio.

In order to reduce bank borrowings collateralized by customers' margin securities, customers' accounts with debit balances are delivered to other broker-dealers who are willing to assume responsibility for such accounts....

The NYSE advises us that they concurred in Weis' decision to deliver accounts in this manner. ... The Exchange states that they gave their

approval 'to reduce the firm's liabilities and to ensure continued safety for all customers not to afford favored treatment to any specific group.' The Commission is not aware of facts indicating a different motivation

* * *

While these efforts to unwind the affairs of Weis without resort to a SIPC liquidation were unsuccessful, such efforts in other instances appear to have been successful in avoiding forced liquidations of broker-dealers and the disruption inherent in such liquidation proceedings."

In addition, NYSE Rule 326(b) requires that a member firm reduce its business as it approaches a point where it might be in violation of the capital requirements of NYSE Rule 325. Counsel for the Exchange notified the Court by letter dated May 21, 1974 that, "such a reduction occurred in respect to Weis through the here challenged transfer of some of Weis' margin accounts to Ladenberg (sic)."

The Exchange is required by section 6 to enforce "so far as within its powers" those of its rules which are designed to insure conduct consistent with "just and equitable principles of trade." The Exchange's efforts to aid Weis did not constitute a failure to fulfill its obligations. Ladenburg, by accepting margin accounts from Weis, did not conspire with the Exchange to

breach its obligation under section 6, nor did Ladenburg breach any independent duty.

Plaintiffs suggest, inferentially, that the rules of the Exchange were inadequate or unsuited to meet the problems Weis encountered, and that somehow, the Exchange should have acted differently. However, while section 6 might provide a remedy for the Exchange's failure to enforce its net capital rule, it does not support an action against the Exchange for failure to enact better or more stringent rules. Citizens, such as plaintiffs may apply to the SEC to alter or supplement the rules of the Exchange pursuant to section 19(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78s(b). Marbury Management, Inc. v. Kohn, 373 F.Supp. 140 (S.D.N.Y. 1974); Kroese v. New York Stock Exchange, 227 F.Supp. 519, 521 (S.D.N.Y. 1964).

Moreover, plaintiffs have failed to state a claim based on Rule 10b-5 against the Exchange and Ladenburg. Plaintiffs have failed to plead scienter as is required in claims based on Rule 10b-5, and have proffered no evidence on this motion, of any scienter. Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972); Shemtob v. Shearson, Hammil & Co., 448 F.2d 442 (2d Cir. 1971).

It is conceded that certain large margin accounts were transferred from Weis to Ladenburg. This action was taken pursuant to practices and methods which the SEC has acknowledged to be an effective means to remedy Weis' problems while protecting the public interest. There is no evidence to support any reasonable inference to the contrary.

The claims plaintiffs have alleged against Weis, and its directors and officers, are based on the same theories and facts as those claims alleged against Ladenburg and NYSE. For the same reasons, we conclude that plaintiffs have no claim against Weis or these additional defendants, on the uncontested facts.

Additionally, plaintiffs cannot recover because the alleged misconduct of the defendants, for which no supportive evidence was offered, was not the proximate cause of the damage. When NYSE and Ladenburg came upon the scene, Weis was already moribund. It had concealed from NYSE, by filing incorrect statements, the fact of its capital impairment. Even if, in defiance of reality, we call the "privileged accounts" which were transferred to Ladenburg "tippees", who evaded the delay and inconvenience of the STPC reorganization through inside information, there is no

reason to believe that the transfer of these accounts hastened or increased the damage to those not "tipped", plaintiffs here. There is no right to share in improperly released information. Levine v. Sallan, Inc., 439 F.2d 328, 334-5 (2d Cir. 1971). If some were caused to leave the sinking ship in time, this breach of duty, if it was one, neither caused nor exacerbated the injuries here complained of. Indeed, to the extent it helped Weis' finances, it may have expedited the SIPC reorganization, and mitigated the damage and inconvenience to Weis' other customers.

Under the circumstances of this case, and upon the undisputed evidence now before the Court, it is appropriate that summary judgment be granted as well to the non-moving parties. See J. Moore, Federal Practice, §56.12. However, our determination is without prejudice to the different factual claims of plaintiffs asserted in the related case of Rich v. Touche Ross & Co., 74 Civ. 772-CLB. Those claims concern Weis' actions, and those of its officers, directors and accountants, between January 1971 and May 1973. Plaintiffs allege in that action that it was during that period Weis failed to keep complete and accurate financial records, and Touche Ross & Co. failed to perform its

duties properly as certified public accountants in auditing the purportedly false statements of net capital filed with NYSE hereinbefore mentioned.

For the reasons herein set forth, summary judgment is granted, and the complaint is dismissed as to all defendants. The motion to declare a class action is denied as moot.

Settle a final Judgment on notice.

Dated: New York, New York
July 22, 1974

Charles L. Briant Jr

CHARLES L. BRIEANT, JR.
U. S. D. J.

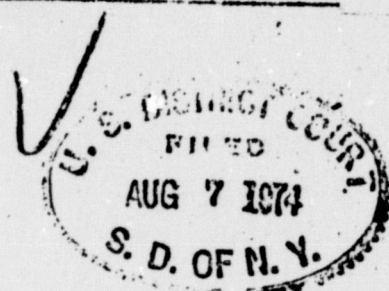
FOOTNOTES

1. The purposes of SIPC are to protect a class of investors from loss, without regard to the presence or absence of wrongdoing as a cause for broker-dealer insolvency. Accordingly, it is not surprising that this statute gives less complete relief than the securities laws give to those injured by tortious conduct.
2. Stock certificates which are in such form as to constitute "good delivery" are negotiable, and the property is merged in the certificate. But a margin customer has no property or proprietary interest, under the usual account agreement, in any particular identifiable stock certificate in the hands of the broker. The most he has in the usual case is a chose in action against the stockbroker, to receive fungible shares forthwith upon payment and demand, or to direct a sale thereof and receive the net proceeds of sale upon the settlement date. Time of performance is of the essence. In a SIPC reorganization, a customer in the protected class, after the dust settles, will receive shares to the extent identifiable, or if not, then to the extent available in a marshalling of available shares against the firm's obligations, with the balance paid in cash value computed as of the date of the trusteeship.

Such a customer has an involuntary partial conversion of his chose in action to cash, with attendant income tax consequences, and if he holds a round lot, he will probably receive an odd lot plus cash. SPIC provides no compensation for these situations, or the delay attendant upon the trustee's activities.

3. We are told on argument that as a practical matter Ladenburg received no financial benefit as a result of these transfers. Conditions in Weis' cage and back office were somewhat chaotic. In most cases, all that was physically delivered to Ladenburg prior to the appointment of the SIPC trustee were "due bills" for the stocks represented by the accounts of these large margin customers. Ladenburg by accepting the accounts, assumed responsibility to deliver the stocks upon payment of the margin debts, and paid to Weis or its creditors in cash or equivalent, the amount of money represented by the net margin debt in the accounts transferred. This had the automatic effect of decreasing Weis liabilities by the amount of the margin indebtedness of the accounts transferred; and, to the extent that the due bills were not honored, or that there was delay in honoring them, Ladenburg, by placing itself in a position of liability towards these transferred customers, formerly occupied by Weis, suffered damages in some significant but unknown amount. It is not suggested that Ladenburg actually profited as a result of these transfers, nor that Ladenburg's profit was of any concern to the defendant Exchange, or any motivation in the procedure followed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
NORMAN RICH, et al., :

Plaintiffs, :

-against- :

NEW YORK STOCK EXCHANGE, et al., :

Defendants. :

----- x

73 Civ. 4642 (C.L.B.)

FINAL
JUDGMENT

The cause having come on to be heard on motion of plaintiffs to declare the action maintainable as a class action and on motion of defendants New York Stock Exchange, Inc. and Ladenburg Thalmann & Co. Inc. for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings, affidavits and other filings of the parties, and having heard oral argument, for the reasons assigned in the memorandum decision of the Court filed July 23, 1974, it is hereby

ORDERED, that plaintiff's motion to declare the action maintainable as a class action be and hereby is ~~denied~~ ^{DISMISSED NOT ON THE MERITS BUT BECAUSE OF THE COURT'S DETERMINATION} ~~and it is further~~ ^{IS FURTHER} WITH RESPECT TO SUMMARY JUDGMENT, AND IT

ORDERED, that the motion of defendants New York Stock Exchange, Inc. and Ladenburg Thalmann & Co. Inc. for summary judgment be and hereby is granted with respect to all defendants, and it is further

ORDERED, ADJUDGED AND DECREED that the second amended complaint be and the same hereby is dismissed as to all defendants and that judgment be entered in favor of all

MICROFILM

AUG 7 1974

CLW

defendants and against the plaintiffs.

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CND
Dated: New York, N.Y.
AUGUST 7, 1974

Charles E. Starvick
U.S.D.J.

JUDGMENT ENTERED:

DATE: August 7, 1974

Raymond L. Burghardt
Clerk

UNITED STATES COURT OF APPEALS

RICH, et al,

Plaintiff-Appellants,

- against -

NEW YORK STOCK EXCH., et al,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

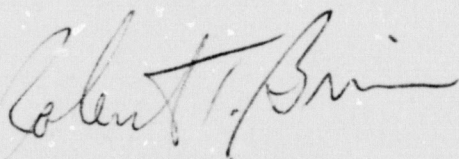
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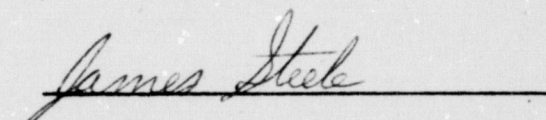
I, James Steele, being duly sworn,
 depose and say that deponent is not a party to the action, is over 18 years of age and resides at
 250 West 146th, Street, New York, New York
 That on the 2nd day of January 1975 at *

deponent served the annexed Joint Appendix upon

*
 the in this action by delivering a true copy thereof to said individual
 personally. Deponent knew the person so served to be the person mentioned and described in said
 papers as the Attorney(s) herein,

Sworn to before me, this 2nd
 day of January 1975




 JAMES STEELE

ROBERT T. BRIN
 NOTARY PUBLIC, STATE OF NEW YORK
 NO. 31 - 9918950
 QUALIFIED IN NEW YORK COUNTY
 COMMISSION EXPIRES MARCH 30, 1975

* Lee Feltman- 295 Madison Ave.
 New York

* Milbank, Tweed, Hadley & Mc Cloy
 1 Chase Man. Plaza, New York

* Roweman, Colin, Kaye, Petschek, Freund & Emil
 575 Madison Ave., New York

* Finley, Kumble, Heine, Underdog & Grutman
 477 Madison Ave.

* Geist, Netter & Marks- 276 Fifth Ave., New York

* Nickerson, Kramer, Lowenstein, Nessen & Kamin
 919 Third Ave., New York